AN Explanation OF THE LAWS AGAINST RECUSANTS, &c. ABRIDGED.

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TO THE READER.

Reader,

THe Uſefulneſs of the LAWS concerning Recuſants, *&c.* Explained (*which is here referred to in Pag.* 7.) *occaſioned the Paines in ſuiting this Abridgement to the ſeveral Editions of the Statutes, by Quotations directed to the Particular Statute, Paragraph and Number, or diſtinct Sentence of each Paragraph;* (*which is moſt proper to the laſt Edition now in the Preſs;*) *and to evince the Neceſsity or great Convenience of thoſe ſeveral Wayes of Section, without which I could not without ſome Difficulty diſcover the Meaning of any Caſes of the leaſt Variation; And therefore what I wrote for my own Eaſe, I hope will not*

not be thought uneasy to others, my Design not intending this Publick, when wrote; But to pleasure a Particular Friend I have permitted it to be so. Some things of weight are here added, particularly Pl. 251. *and other things of less moment are added or omitted, as seemed fit, and that it be but as kindly received as I intended, is the utmost Desire of*

Grayes-Inne,
27 March
Anno 1681.

JOSEPH KEBLE.

AN EXPLANATION OF THE *LAWS* AGAINST POPERY ABRIDGED.

Stat. 1. Eliz. 1.

Of SUPREMACY.

Page 2. The Statute of 1 & 2 *Phil.* and *Mar.* 8. mentioned 1 *Eliz.* 1. § 2. *N.* 1. repealed 26 *H.* 8. 1. and 35 *H.* 8. 3. by both which King *H.* 8. his Heirs and *Succeſſors* were declared Supream Head of the Church of *England*, and by repeal of 1 and 2 *Ph.* and *Mar.* 8. thoſe other Statutes 26 *H.* 8. 1. and 35 *H.* 8. 3. were revived, and are again in force, 4 *Inſt.* 325. III.

Page 5. By the abrogation of the Juriſdiction of any forreign Prelate 1 *Eliz.* 1. § 16. *N.* 2. all Juriſdiction derived from ſuch Forreigner IV.

reigner is abrogated likewise: and therefore the concurrent Jurisdiction which the Arch-Bishop of *Canterbury* is supposed to have in the inferiour Dioceses ought not now to be exercised by him, but is utterly taken away by this Act: for he had it not as Arch-bishop but as *Legatus natus* to the Pope, *Heb.* 17. Dr. *James* Case, *Lamb.* 224.

V. *High Commission.*

Page 8. The Jurisdiction and authority by 1 *Eliz.* 1. § 18. *N.* 1. given to the late Court, called the High Commission Court, are now taken away by 17 *Car.* 1 *cap.* 11. § 4. *N.* 1. But the power given by 1 *Eliz.* 1. § 18. *N.* 1. to the Queen to constitute such Commissioners was no more than she had before by ancient prerogative and the Laws of the Land, for thereby she might have made such an Ecclesiastical Commission, if 1 *Eliz.* 1. § 18. had never been made, 5. *Co.* 8. 9. *Cawdries* Case, and 2 *Cr.* 37.

VI.

Page 13. If a man had done any deed or act, or executed any thing which amounted to the holding, standing with or maintaining the Spiritual or Ecclesiastical Jurisdiction of any forreign Prelate, &c. he might before the Statute of 23 *Eliz.* 1. § 8. *N.* 1. have been indicted for it after the year expired; for the restraint here 1 *Eliz.* 1. § 31. *N.* 1. in point of time extends to offences committed by preaching, teaching, or words only, and not to all Cases within this branch, as *Wing. Crown* 10. mistakes.

But now by the Statute 23 *Eliz.* 1. § 8. *N.* 1. It seemeth that the prosecution must be

be within a year and a day for all offences whatsoever againſt this Act.

Page 13, 14. The half year here mentioned 1 *Eliz.* 1. § 31. *N.* 2. is not to be underſtood of ſix months (as *Wingate* Crown 10. miſtakes) which is in Law to be accounted *ſecundum numerum ſingulorum dierum* allowing XXVIII. dayes to every month, and not according to the Solar month, nor according to the Kalendar, unleſs it be on 13 *Ed.* 1. *W.* 2. *cap.* 5. § *N.* for the lapſe in *Quare Impedit*, and by 2 and 3 *Ed.* 6. 13. § *N.* of proving a ſuggeſtion 1 *Inſt.* 135. and 2 *Crook* 166, 167. B. of *Peterborough* verſ. *Catesby*, *Yelverton* 100. *Catesby* verſ. *Baker*, and *Hob.* 179. *Copley* againſt *Collins*. But the halfe year in 1 *Eliz.* 1. § 31. *N.* 2. is to be underſtood according to the Kalendar *Infra pl.* 65. VII. *Dayes.*

Page 14. Sir *Edw. Coke* 4 *Inſt.* 331 in his Conſtruction of 1 *Eliz.* 1. § 31. *N.* 2. ſaith that no perſons ſhall be impeached for any of the offences by preaching, teaching, or words, unleſs they be lawfully indicted within the ſpace of half a year, but yet it ſeemeth, that the words of the Statute will not bear ſuch a Conſtruction, neither if they did, is it Law at this day, nor was then when the Inſtitutes were wrote. VIII.

1. For that 1 *Eliz.* 1. § 31. *N.* 2. refers only to the Caſe of Impriſonment, that where the Offender by preaching, teaching, or words is impriſoned, and is not indicted within half a year after the offence committed, he ſhall be ſet at liberty and ſhall

be no longer detained in Prison for any such cause or offence, and this was done in favour of liberty, and to prevent a long imprisonment upon a malicious and groundless accusation; but there is no colour to extend the words to the Offender, who was never imprisoned, altho the offence was by preaching, teaching, or words only.

2. Put the Case, that an Offender by preaching, teaching, or words, had been imprisoned within the half year, yet it seems very questionable, whether at the half years end, when he was set at liberty (as he ought to be by 1 *Eliz.* 1. § 31. *N.* 2. if he be not in the mean time indicted) he should have been clearly discharged by this Act from any prosecution, during the half year then next following, for altho it be said (**he shall be no longer detained in Prison for any such cause or offence**) yet that seems to refer only to his imprisonment before conviction, and (**detained**) imports as much, *Viz.* That he should not be continued or remain in the same imprisonment, which he suffered within the first half year, before any Indictment was found against him, but not that he should not be indicted afterwards within the compass of the year, and if found guilty suffer the imprisonment and other penalties inflicted by this act; and it might so have happened, that an Offender by preaching, teaching, or words might have been accused, taken, and imprisoned a day or two before the half year next after

the

the offence expired, in which Case it cannot be thought to be the meaning of the makers of the Law, that by his imprisonment for a day or two he should escape the penalties of the Law, and could not be afterwards indicted within the compass of the year, and yet in that Case he ought to be set at liberty by the express words of the Act, which saith (**he shall be set at liberty if not indicted within half a year after the offence**) and not half a year after his imprisonment.

3. It seems now to be out of doubt, but that any Offender against 1 *Eliz.* 1. altho by preaching, teaching, or words, may be indicted at any time within a year and a day after the offence committed, and that by 23 *Eliz.* 1. § 8. *N.* 1. which saith, that all offences against 1 *Eliz.* 1. and 5 *Eliz.* 1. and 13 *Eliz.* 2. touching acknowledgment of her Majesties Supream Government in Causes Ecclesiastical shall and may be inquirable within a year and a day after the offence committed, and the affirming or maintaining the Spiritual or Ecclesiastical Jurisdiction of a Foreigner was without question an offence against her Majesties Supream Government in Causes Ecclesiastical, & against the acknowledgment thereof, so that the year limited by 23 *Eliz.* 1. § 8. *N.* 1. is now extended to a day further: and what ever the meaning of it was as to the half year all offences against it, whether by preaching, teaching, or words, or otherwise (for 23 *Eliz.* 1. § 8. *N.* 1. is general, and reaches all offences whatsoever against 1 *Eli.* 1.

touching the Supremacy Eccleſiaſtical, may now be inquired of within a year and a day, whether the party be in priſon or not, but yet it ſeemeth, that in Caſe of Impriſonment within the firſt half year this proviſion 1 *Eliz.* 1. § 31. *N.* 2. for the ſetting at liberty of the Priſoner at the end thereof, if he be not before that time indicted, remains ſtill in force, and is not abrogated by 23 *Eliz.* 1. § 8. *N.* 1.

IX. *Dignity.* **Page 16.** The Proviſion made in 1 *Eliz.* 1. § 34. *N.* 1. and other Acts of Parliament for the Tryal of a Peer by his Peers in caſe of Treaſon, where he was to be tryed by the Courſe of the Common Law is *ex abundanti*, and he ſhould have ſuch tryal if no ſuch proviſion were inſerted, the like in the caſe of Felony, *Stamf. Coron.* 159.

X. *Treaſon.* *Lambert* 2. *cap.* 7. *pag.* 227. Juſtices of Peace cannot deal with Traytors in the point of Treaſon, but as Breakers of the peace, ſaving that in ſome Caſes they have a ſpecial power to inquire and receive Indictments only, and of this ſort are, 1. Treaſon of extolling Foreign power by 1 *Eliz.* 1. § 27. *N.* 1.

2. The Treaſon of abſolving or withdrawing his Majeſties Subjects from their natural obedience, by 23 *Eliz.* 1. § 2. *N.* 1. &c.

And 3. The Treaſon of putting in ure any Inſtrument of Reconciliation gotten from the See of *Rome*, by 13 *Eliz.* 2. § 2. *N.* 1.

XI. *Lambert* 56. There hath been care taken once

once or twice in our memory to exact this Oath of Supremacy, 1 *Eliz.* 1. § 19. *N.* 4. of all the Justices of the Peace throughout the Realm, whereof some good hath ensued; but yet many a Justice there is, that by indirect practice, never took either this or the Oath of Offices, whereof what harms do or may grow, I leave to wiser and higher Men to be considered, adding this only, that it would avail greatly to the furtherance of the service, if the *Dedimus Potestatem* to give these Oaths were dirigible to the Justices and none other to minister the same, not elsewhere, but in their open Sessions. *Oath.*

Crompt. 10. *b.* Every Justice of Peace before he takes upon him to exercise or occupy the Office of a Justice of Peace shall take the Oath of Supremacy, 1 *Eliz.* 1. § 19. *N.* 4. XII. *Justices.*

Crompt. 11. *Nota*, That the Justices of Peace ought to take this Oath of Supremacy in the open Court of Sessions, where he serves, by 12 *Eliz.* 1. § 15. *N.* 1. and I have seen it done at the Assizes in the County of *Stafford*, and its the best way to be so done, for where on 5 *Eliz.* 1. § 7. *N.* 1. a Commission is made to take their Oaths, when they are made Justices of Peace, it may be that the Commissioner will return, that he hath taken his Oath, when he hath not done so in fact, if he that be to be sworn be such a one, as is not well affected to the Religion now established. XIII.

Crompt. 12. Charge in Sessions. First to in- XIV.

Religion. inquire if any within this year and day hath depraved, deſpiſed, or contemned the Sacrament of the Body and Blood of our Saviour Jeſus Chriſt in contempt thereof by any Contemptuous words, or by any words of depraving, deſpiſing, or adviſedly hath in any other manner contemned, deſpiſed, or reviled the ſaid Sacrament contrary to the Edicts and Declarations heretofore, *&c.* 1 *Ed.* 6. 1. § *N.* 1 *Eliz.* 2. § *N.* and 23 *Eliz.* 1. § *N.*

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1 Eliz. 2.

Of RELIGION.

XV. *Incumbent.* PAge 21. Altho the firſt part of this Clauſe of 1 *Eliz.* 2. § 3. *N.* 1. Viz. **all and ſingular Miniſters in any Cathedral, or Pariſh Church, or other place**) ſeems to intend a local Miniſter only, and not one, who is neither Parſon, Vicar, or Stipendary Chaplain, yet the next words (1 *Eliz.* 2. § 4. *N.* 1. **If any Parſon, Vicar, or other Miniſter, that ought to ſay Common Prayer, or miniſter the Sacraments**, &c.) thereby comprehend all lawful Miniſters and Prieſts whatſoever, for 'tis held in our Law, that as he is *Sacerdos* he ought and is bound *Jure divino celebra-*

re,

re Canam Dominicam & dicte Cane actionet, &c. and if he be indicted upon this Statute with the addition of *Clericus*, that word implies him to be a Prieſt or Miniſter within the meaning thereof, *Dyer* 203. *pl.*

2. Note, That by the Statute 13 and 14 *Car.* 2. 4. § 2. *N.* 2. this 1 *Eliz.* 2. and all other Laws which were then in force for the Uniformity of Prayer, and adminiſtration of the Sacraments within the Realm of *England*, are now applicable to the Book of Common Prayer, authorized by 14 *Car.* 2. 4. and are to be put in ure with relation to the ſaid Book.

Page 21, 22. Theſe words 1 *Eliz.* 2. § 4. *N.* 2. (**wilfully or obſtinately ſtanding in the ſame**) ſeem to reſtrain the Law to ſuch other prayers as are uſed in hinderance of, or oppoſition to the Common-prayer, or after admonition or warning to the contrary, and therefore the Prayers uſed in the Pulpit before Sermon ſeem not to be within the meaning of this Law, nor to be forbidden by it, becauſe generally tollerated by thoſe in authority, and ſo not obſtinately uſed: and were thoſe words wanting, altho the words of the Statute 1 *Eliz.* 2. § 4. *N.* 2. are general, any other Form or open Prayers, yet they ought to have a particular Conſtruction, according to reaſon, and the intent of the Makers of the Law (*Viz.* That no Miniſter ſhall uſe any other form to the hinderance of, or in oppoſition to this; for a penal XVI. *Religion.*

Law

Law ſhall not alwayes be conſtrued according to the words, but according to the intent, *Com.* 18. 465, 466, 467. 109, 110. and the words of a Law may be infringed, and yet the Law it ſelf may not, which intent ſhall never be conſtrued to be againſt reaſon, for many things are excepted out of Statutes by the Law of Reaſon, which are not excepted by expreſs words, 4 *Inſt.* 330, 331. *Com.* 13.

XVII. *Indictment.* Page 22. One indicted on 1 *Eliz.* 2. § 5. *N.* 1. for adminiſtring Baptiſm in other form then is thereby preſcribed, and is convicted, and afterwards is again indicted for the like offence, 1 *Leon.* 295. *Pl.* 403. by the opinion of *Clench* Juſtice in *B. R.* the ſecond Indictment muſt mention the firſt Conviction, or the Judgment cannot be for the ſecond Offence, *viz.* Impriſonment for a year, and deprivation: But *Wray* Cheif Juſtice held, that if both Indictments were before the ſame Juſtices, they are to take notice of the firſt conviction, altho it be not mentioned in the ſecond Indictment, and ought to give Judgment accordingly; but if the ſecond Indictment be taken by other Juſtices, then without mention therein of the firſt Conviction they cannot give Judgment for the ſecond offence.

XVIII. *Bar. & Feme.* Page 24. A Feme Covert is within the meaning of (1 *Eliz.* 2. § 9. *N.* 1. any perſon, &c.) and ſhall be liable to the penalties thereby inflicted, *Hob.* 97. *Moor* verſus *Huſſey. Dyer* 203. *pl.* Sir *Edward Walgrave*'s Caſe.

Page

Page 24. There hath been a great queſtion when this Parliament of 1 *Eliz.* began, *Poulton* ſaith *Jan.* 23. *Dyer* 203. *pl.* is *Jan.* 25. and 4 *Inſt.* 7. is *Febr.* 25. and for the incertainty when it commenced, an information upon 1 *Eliz.* 2. § 9. *N.* 1. againſt Sir *Edward Walgrave* and his Wife by the Queens Attorny without any ſpecial recital of the Statute only ſuppoſing the offence to be *Contra formam & effectum cujuſdam Statuti in Parliamento tent' apud Weſtmon. Anno primo Reginæ nunc, &c. Dyer* 203 *pl.* was held good; For this is a general Statute, and ſo needs not be particularly recited, *Com.* 53. 79. 81. 23. XIX. *Parliament.*

Page 24. The hearing of Maſs is a maintaining within 1 *Eliz.* 2. § 9. *N.* 2. and the perſon hearing is indictable, thereupon, *Hob.* 97. *Dyer* 203 and 323 *pl.* *Fermors* Caſe. XX. *Religion.*

Page 25. The Offender in any of theſe Caſes (*viz.* 1 *Eliz.* 2. § 10. *N.* 1. & § 11. *N.* 1.) cannot be puniſhed for the ſecond offence before he be adjudged for the firſt, and that ſecond offence muſt be committed after the Judgment given for the firſt; nor for the third offence before he be adjudged for the ſecond, and that third muſt be committed after the Judgment for the ſecond, for *quod non apparet non eſt, & non apparet Judicialiter ante Judicium*, 2 *Inſt.* 479. *Dyer* 323 *pl.* XXI. *Indictment.*

Page 25, 26. An Information was brought by the Attorny General in *B. R.* upon 1 *Eliz.* 2. § 9. *N.* 2. for hearing Maſs. XXII. *Forfeiture.*

and

and Judgment given, *Trin.* 3 *Eliz. Quod forisfaceret Dominæ Reginæ, & si non solvet infra, &c. tunc Imprisonabitur*, &c. as 1 *Eliz.* 2. § 12. *N.* 1 and 13. *N.* 1. the forfeiture was estreated into the Exchequer within the six weeks mentioned in the Statute, and before the six weeks expire, the Defendent in the Information dieth. *Quære*, whether his Executors shall be charged with the forfeiture of an hundred marks, for that the Offender died within six weeks, and so by the act of God his body cannot suffer imprisonment for six months in lieu of the forfeiture, and the Statute gave his Election in this Case, whether he would suffer imprisonment or pay the hundred marks, *Dyer* 203, 231. *pl.* Sir *Edw. Walgraves* Case. But this Question may now be prevented, for the Offender may be indicted upon 23 *Eliz.* 1. § *N.* which inflicts for such offence an hundred marks and imprisonment both.

XXIII. *Bar. & Feme.*

Page 26. A Feme Covert is within this Statute (1 *Eliz.* 2. § 14. *N.* 1. **all and every Person**, &c.) and shall forfeit twelve pence, if she repair not to Church every *Sunday* and holyday 11 *Cook* 61. Dr. *Fosters* Case 1 *Rol.* 93, 3 *Bulstr.* 87. *pl. Dominus Rex & Law, Hob.* 97.

XXIV. *Alien.*

Page 26. In an Indictment upon 1 *Eliz.* 2. § 14. *N.* 1. It need not be inferred that the Offender is an Inhabitant within this Realm, *&c.* for if he be not, that ought to come on the other side, *Godbolt* 148. *pl.* 191. *Ann Mannocks* Case.

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Page 26, 27. Nor need be averred in such indictment on 1 *Eliz.* 2. § 14. *N.* 1. that the Party had no lawful or reasonable excuse to be absent, but that ought likewise to come on the other side. 2 *Leonard* 5. *pl.* 6 *Eliz. Dormers* Case. Note, that these words **Having no lawful or reasonable excuse**, &c. are by mistake in that Case supposed to be in 23 *Eliz.* 1. XXV. *Averment.*

Page 27. If a Man doth not resort to the Church of the Parish wherein he dwelleth, nor to the Chappel of Ease, whereunto the place of his abode belongs: yet if he goeth to that Church or Chappel to which he hath been accustomed to resort, it seemeth to be sufficient to satisfie the intent of 1 *Eliz.* 2. § 14 *N.* 1. 1 *Bulst.* 159. XXVI. *Church.*

Page 27. Altho the words of 1 *Eliz.* 2. § 14. *N.* 1. be disjunctive (*Viz.* **That he shall abide there during the time of Common Prayer, Preaching or other Service of God**) yet they are to be taken conjunctively, and the party ought not to depart when the Service is ended, if there be preaching, but must continue there for the whole time, *Godbolt* 148. *pl.* 191. *Mannocks* Case, and yet if he abides there during the whole time he may be liable to the penalty of this Law, for there are four Adverbs in 1 *Eliz.* 2. § 14. *N.* 1. XXVII.

1. Diligently, which denotes Attention.
2. Faithfully, which denotes Devotion.
3. Soberly, which denotes Gravity.
4. Orderly, which denotes Decency.

All

All which ought to be obſerved ſo, that if he walk or talk in the Church, during the ſervice of God there, he may be puniſhed upon this Act, as if he were abſent, by *Cook* Cheif Juſtice, 1 *Rol.* 93. Dr. *Foſter's* Caſe.

XXVIII. *Forfeiture.* Page 27, 28. This Forfeiture 1 *Eliz.* 2. § 14. *N.* 2. ſtill remains, notwithſtanding the Statute of 23 *Eliz.* 1. § 5. *N.* 1. which gives the 20 *l. per* month, and that appears by 3 *Jac.* 4. § 27. *N.* 2. which gives a more ſpeedy remedy for the recovery of the Forfeiture of twelve pence, and by the different times when theſe two Forfeitures are due, which ſheweth that the one was not intended in the Room of the other: For the 20 *l. per* month is due for a months abſence, and cannot be ſued for till the month is paſt; but the twelve pence is due for every abſence, either Sunday or Holyday, for it is forfeited as ſoon as the Sunday or Holyday is paſt, and may be ſued for every week.

So that the Recuſant may be puniſhed both by this Statute for his weekly abſence 1 *Eliz.* 2. § 14. *N.* 2. and by 23 *Eliz.* 1. § 5. *N.* 1. for his monthly abſence, nor is he helped by this Act in caſe of Conformity, as he is by 23 *Eliz.* 1. Dr. *Foſter's* Caſe, 11 *Co.* 63. and 2 *Rolls* 94. *pl.* 41.

But yet altho 1 *Eliz.* 2. § 14. *N.* 2. doth not diſcharge him of this twelve pence upon Conformity, it ſeemeth that 1 *Jac.* 4. § 2. *N.* 1.

XXIX. Page 28. The Ordinary or Eccleſiaſtical

cal Judge, by 1 *Eliz.* 2. § 15. *N.* 1. and § 16. *N.* 1. cannot legally puniſh any man for not coming to the Church of that Pariſh where he inhabits, if he goeth to any other, altho he ſheweth not any reaſonable let, for it ſhall be a good Plea for the Party to ſay, that that is not his Pariſh Church, but that he had uſed to frequent another Church, and did reſort thereunto, and if the Eccleſiaſtical Court will not receive this Plea, the Party ſhall have a Prohibition, for the Spiritual Court hath no power to judge what ſhall be ſaid a mans Pariſh Church, and ſo it was reſolved by the whole Court of Kings Bench, *Trin.* 9. *Eliz.* 1. *Bulſtrode* 159. nor can the Spiritual Court try the limits or bounds of Pariſhes, but they ſhall be tryed by the Common Law, 13 *Co.* 17. *Ordinary.*

Page 30. Theſe words **in like manner and form**, in 1 *Eliz.* 2. § 22. *N.* 1. appoint in what manner the offences ſhall be enquired of, heard, and determined by Mayors and Head Officers of Corporations, &c. By Indictment, for ſo (**inquire**) imports, and tryal and verdict of twelve men, or ſuch other legal proceedings upon the ſaid Indictment, as are uſed by the Juſtices of *Oyer* and *Terminer*, and Aſſizes in their general Seſſions: For the Mayor or Head Officer is not left by this Act to his own arbitrary will or diſcretion in the hearing and determining the offence, but muſt proceed according to the rules and forms of Law in the Conviction of the offender. XXX. *Corporation.*

2. And

2. And 1 *Eliz.* 2. § 22. *N.* 1. faith (**to which Justices of Assize do not commonly repair**) so that the Mayor or head Officer of such places were only intended in the lieu and room of Justices of Assize, and are therefore to proceed by the same Rules, as they do in the Counties at large.

Dayes. 3. But these words 1 *Eliz.* 2. § 22. *N.* 1. extend not to the point of time limited for indicting such offender, nor are Mayors and head Officers tyed to their next Sessions, as the Justices of *Oyer* and *Determiner*, and of Assize are, as *Wing.* Tit. *Service and Sacraments*, *N.* 26. mistakes; for (**in like manner and form**) is intended in such respects only where it is not otherwise provided for by the Statute, but it is expresly provided here 1 *Eliz.* 2. § 22. *N.* 1. that Mayors, and Head Officers of Corporations shall inquire of these offences only twice in the year (*Viz.* **within fifteen dayes after** Easter **and** Michaelmas) and not at their general Sessions, unless it happen to be the Sessions after one of those two Feasts.

Nor can the Arch-Bishop, or Bishop by 1 *Eliz.* 2 § 8. *N.* 1. associate himself in this Case to any Mayor or Head Officer of a Corporation, as *Wing.* Tit. *Service and Sacraments*, *N.* 25. mistakes.

XXXI. *Ordinary.* **Page** 31. This Clause 1 *Eliz.* 2. § 23. *N.* 1. and § 24. *N.* 1. being in the affirmative, doth not abrogate the Jurisdiction Ecclesiastical, which was in the Ecclesiastical Judge before the making of this Statute, for that he

no negative words are here added, as that he ſhould proceed no otherwiſe, or in no other manner or form, than this Statute directs.

2. And therefore, if any Parſon, Vicar, *&c.* deprave or obſerve not the Book of Common-Prayer, altho 1 *Eliz.* 2. § 4. *N.* 5. inflicts only the forfeiture of a years value, and ſix months impriſonment for the firſt offence, yet the Eccleſiaſtical Judge may for the firſt offence deprive him notwithſtanding this act, as he might have done if no form of puniſhment had been here appointed.

3. And the ſaid Book 1 *Eliz.* 2. § 4. *N.* 1. being enjoyned by Authority, the Offence of depraving or non obſerving it, is puniſhable by the Eccleſiaſtical Judge, according to the Eccleſiaſtical Law, without the further aid of any temporal Law, than the commanding it to be obſerved, 5 *Cook* 6. *Cawderyes* Caſe; and in ſuch Caſe the Sentence of deprivation, given by the Eccleſiaſtical Judge, tho it exceed the puniſhment inflicted by the temporal Law, is not to be queſtioned by the temporal Judges, but they ought to give faith and credit to it, 5 *Cook* 7. *Cawderies* Caſe, 4 *Cook*, 29. *Buntings* Caſe.

5 Eliz. 2.

Of ROME.

XXXII. *Books.*

Page 34. The Printers of any Book, which attributes to the Pope, or See of *Rome*, any such Authority or Jurisdiction within this Realm, &c. And the Utterers thereof are in most Cases within the danger of this Law, 5 *Eliz.* 1. § 2. *N.* 1.

2. And if any man bring over such books written beyond the Seas, knowing the Contents thereof, or secretly deliver out such books to others, he knowing the Contents thereof, or secretly deliver out such books to others, he knowing the Contents thereof (unless in this last Case he be a Trader in them, and delivers them out upon that account, without any act or attribution by conference or allowance) he is an Offender within 5 *Eliz.* 1. § 2. *N.* 1. by the words, **hold and stand with to maintain**, &c.

3. And so is the Receiver likewise, if he afterwards Reads and confers upon any such book with any other person, and in his conference by any words or speeches, allows the book to be good, or conveyes it secretly to his friend, to the intent he should read it, and be perswaded to be of that opinion, 5 *Eliz.* 1. §

1. § 2. *N.* 2. Or if a man hear of the Contents of ſuch book, by the repute of others, and doth by any overt Speech commend or affirm it to be good: In all theſe Caſes the perſon ſo doing, eſpecially he that reads it, and then allows of it, is an Offender, within this Act, 5 *Eliz.* 1. § 2. *N.* 1.

4. And ſhall for the firſt Offence incur a *Præmunire*, and for the ſecond be guilty of high Treaſon: So likewiſe if any Book to that effect be made and written within the Realm, and ſent over Seas, as if it were made out of the Realm, and be afterwards bought, read, or conference be had thereupon, *ut ſupra*, ſuch Offenders are within the danger of this Law, *Dyer* 281, 282, *pl.* and 6 *Cook the Preface.*

Page 35. *A.* was indicted upon 5 *Eliz.* 1. § 2. *N.* 3. and that of 13 *Eliz.* 2. § 4. *N.* 1. of a *Præmunire* for aiding one *E.* knowing him to be a Principle maintainer of the authority and juriſdiction of the Biſhop and Sea of *Rome*, *contra formam Statuti prædict.* and the Indictment was certified in *B. R.* and it was held by the greater part of the Juſtices, that the Indictment was inſufficient, for want of thoſe words, 5 *Eliz.* 1. § 2. *N.* 3. **upon purpoſe, and to the intent to ſet forth and extol the Authority,** &c. *& contra formam Statuti* will not ſupply that defect, *Trin.* 20. *Eliz. Dyer* 363. *pl.* XXXIII. *Acceſſories.*

2. *Note* in the report of *Dyer* 363. *pl.* the Statute 1 *Eliz.* is miſtaken for this 5 *Eliz.* 1. there being no mention of the intent in 1 *Eliz.* 1.

The Intent is a thing hidden, and lieth in the heart, and therefore there muſt be ſome overt act or ſpeech, which declares the intent, for the intent it ſelf is not traverſable, but that by which it is made manifeſt, as was adjudged in 5 *Cook* 77. *Boothe's* Caſe.

XXXIV. *Indictment.* Page 36, 37. **All Offences, 5 Eliz. 1. § 3. N. 1. contrary to the true meaning of the premiſſes**, that is the Offences, 5 *Eliz.* 1. § 2. *N.* 1. in holding or ſtanding with, to extoll *&c.* the Juriſdiction of the See or Biſhop of *Rome*, or attributing ſuch juriſdiction, *&c.* or procuring, counſelling, *&c.* which is here for the firſt offence made a *Præmunire*, for theſe are the only premiſſes in the Act.

2. And 5 *Eliz.* 1. § 3. *N.* 1, Extends not to the Oath of Supremacy, or any offence in refuſing of it, much leſs to all Offences againſt this act, as it is miſtaken in the late Additions to *Dalt. Cap.* 140. Tit. *High Treaſon, Sect.* 11.

3. Nor doth it ſeem to be the intent of 5 *Eliz.* 1. § 3. *N.* 1. to give the Juſtices of Peace any power to enquire of any offence made High Treaſon thereby; for the power here given to the Juſtices of Peace is only to inquire of Offences contrary to the true meaning of the premiſſes, and the premiſſes extend only to theſe Offences made a *Præmunire*, and this clearly appears by the ſubſequent words, *viz.* 5 *Eliz.* 1. § 3. *N.* 2. that the Preſentment thereof ſhall be certified in *B. R.* who ſhall hear and determine every ſuch Of-

fence,

ſence, as if the Offender had been preſented upon any matter in the Statute of *16 Rich.* 2. § Now that cannot be intended of high Treaſon, *Dalt.* 54. *Cap.* 20.

4. The like may be ſaid of Juſtices of Aſſize, for as they are meerly Juſtices of Aſſize, they cannot by force of this Act, 5 *Eliz.* 1. § 3. *N.* 1. inquire of either the firſt or ſecond Offence, in refuſing the Oath of Supremacy, nor of the ſecond Offence in extolling the Biſhop of *Romes* authority; only for the firſt Offence in Extolling, *&c.* they may inquire and take Indictments thereof, and certifie them in *B. R.*

5. But then by their Commiſſion of *Oyer* and *Terminer*, they may not only inquire of the firſt or ſecond Offence in extolling the Biſhop of *Romes* authority or refuſing the Oath of Supremacy, but may hear and determine them, and accordingly, *Savil* 46, 47. *pl.* 99. *Slade* and *Bode* were indicted, arraigned, and tryed in the County of *Southampton* of a *Præmunire* for the firſt Offence in extolling the Biſhop of *Romes* authority, upon which they were attainted, and afterwards of Treaſon for the ſecond Offence, before Sir *Roger Manwood* and Juſtice *Periam*, Juſtices of Aſſize, by vertue of their Commiſſion of *Oyer* and *Terminer*, for the Certificate here mentioned, 5 *Eliz.* 1. § 3. *N.* 2. which is to be ſent in *B. R.* is required only of the Juſtices of Aſſize and the Juſtices of the Peace; but Juſtices of *Oyer* and *Terminer* upon Indictments taken before them, may proceed to hear and deter-

mine as *Manwood* and *Periam* did in that Caſe, as well for the firſt as ſecond Offence.

6. For which firſt Offence in extolling the Biſhop of *Romes* authority, it ſeems the Juſtices of Aſſize, who have a Commiſſion of *Oyer* and *Terminer* have their Election either as Juſtices of Aſſize to enquire only, and then they muſt certifie the preſentment, or Indictment into *B. R.* or to inquire hear and determine, as they are Juſtices of *Oyer* and *Terminer*, and then they are not bound to certifie: for Commiſſioners of *Oyer* and *Terminer* are not within the meaning of this branch of 5 *Eliz.* 1. § 3. *N* 2. as was held, *Savil* 46, 47. *pl.* 69.

7. By what hath been ſaid it appears that the queſtion put in *Savil* 47. *pl.* 99. by *Ayloffe*, *viz.* how they could proceed upon ſuch an Indictment, not certified in *B. R.* within forty dayes, was grounded upon a double miſtake. 1. That Juſtices of *Oyer* and *Terminer* were bound to certifie in *B. R.* all Indictments for extolling the authority of the Biſhop of *Rome*, taken before them. 2. That Indictments for the ſecond Offence were within the meaning of 1 *Eliz.* 1. § 3. *N.* 2. for he ſpeaks thereof the ſecond Indictment, which was for High Treaſon.

XXXV. *Indictment.*

Page 37. By Preſentment here 5 *Eliz.* 1. § 3. *N.* 2. is to be underſtood, not only that which is properly ſo called, which the Jurors find and preſent to the Court, without any former Indictment delivered to them: but alſo an Indictment, which is drawn and

engrossed in form of Law, and delivered to the Jurors to be inquired of, which Indictment, the Justices here named have power to take, by force of the word Inquire, 5 *Eliz.* 1. § 4. *N.* 1. and is included within the word Presentment, 5 *Eliz.* 1. § 3. *N.* 2. being a species of it, for every Indictment found by the Jurors is a Presentment, and the Record saith *Juratores, &c. presentant* &c. when they find an Indictment, but every Presentment is not an Indictment, 2 *Inst.* 239. and as well the one as the other, touching the Offences aforesaid, must be certified in *B. R. infra* 72.

Page 27, 38. If the term be then open in 5 *Eliz.* 1 § 3. *N.* 2. is the Essoyn day which is the first day of the Term, properly so called, and on that day the Term is open (At the first day of full Term 5 *Eliz.* 1. § 3. *N.* 2.) that is *quarto die post*, which is the usual day of Appearance, and the first day of every Term in common reputation, for the Essoyn day is the first day of the Term, only to some particular intents, and 'tis not full Term till *quarto die post*, *Savil* 124. *pl.* 193. *Matthew* ver. *Harcourt.* So that if forty dayes expire on the day before the Essoyn day, the Presentment need not be certified until *quarto die post*, which is the day of Appearance, but if they expire on the Essoyn day or afterwards and before the *quarto die post*, the Justices here named, 5 *Eliz.* 1. § 3. *N.* 1. must not stay till the *quarto die post*, but are bound to certifie by the last day of the Forty days XXXVI. *Dayes.*

under the penalty here limited 5 *Eliz.* 1. § 3. *N.* 3. for the Term was then open.

XXXVII. *Oath.* Page 39. All Persons who are preferred to any such Ministry or Office, 5 *Eliz.* 1. § 5. *N.* 6. whether of the gift of the King or of a Subject, are bound to take this oath of Supremacy, 1 *Eliz.* 1. § 19. *N.* 4. and not only such as are preferred by the King as 'tis restrained in the late Additions to *Dalton*, 184 *Cap.* 81.

XXXVIII. Page 39. This 5 *Eliz.* 1. § 5. *N.* 6. takes in so much of the Canon and Civil Law, as is here allowed, but the Common Law, as the peculiar Law of this Kingdom, is here preferred and perticularly mentioned, and not the Canon Law, as is erroneously said in the late Additions to *Dalton* 184. *cap.* 81. *Sect.* 11.

XXXIX. Page 39. The Statute 5 *Eliz.* 1. § 5. *N.* 10. saith not that those, who belong not to any Court, shall take the Oath before those, who are authorized by common use to give it, as *Wingate Crown* 20. in fine mistakes, for this being then new a Oath devised by the makers of 5 *Eliz.* 1. § 19. *N.* 4. no person could have authority by Common use to administer it, and the act, 5 *Eliz.* 1. § 5. *N.* 10 plainly enough speaks of those, who have authority by common use to admit the party to the Office, and not authority by common use to give the Oath, *Infra* 66.

XL. *Ordinary.* Page 39. Upon 5 *Eliz.* 1. § 6. *N.* 1. If a man be Indicted for refusing this Oath of Supremacy before him who is reputed to be the

the Biſhop of the Dioceſs, and he plead to the Indictment not guilty, he may upon that iſſue give in evidence, *quod non fuit Epiſcopus tempore oblationis Sacramenti*, *Dyer* 234. *pl. Boners* Caſe.

XLI. *Certificate.*

Page 41. It is not neceſſary on 5 *Eliz.* 1. § 9. *N.* 1. that it be mentioned of Record in *B. R.* how or by whom the Certificate was brought in thither, and in *Bonners* Caſe, *Dyer* 234. *pl.* where the Biſhop of *Weſtminſter* certified the refuſal of this Oath of Supremacy, and Exception was taken, that the Certificate was entred to be brought into Court *per A. B. Cancellarium dicti Epiſcopi*, but not *per mandatum Epiſcopi*, and the Exception was diſallowed for that reaſon.

XLII. *Enqueſt.*

Page 41. And on 5 *Eliz.* 1. § 9. *N.* 3. a Jury of the County where the Kings Bench is can do no more in this Caſe than inquire, that is indict the party refuſing the Oath, unleſs where the refuſal is in the ſame County.

2. *Horn* Biſhop of *Winchester* tendered this Oath in *Surrey* parcel of his Dioceſs, to *Bonner* then late Biſhop of *London*, who refuſed to take it, and this was certified by the Biſhop of *Winchester* into *B. R.* then ſitting at *Weſtminſter* in the County of *Middleſex*, where *Bonner* was Indicted by a Jury of that County, according to this Act, 5 *Eliz.* 1. § 9. *N.* 3. the queſtion was, by what County he ſhould be tried, whether by a Jury of *Middleſex*, where the Indictment was taken, or by a Jury of *Surrey*, where the Offence was

was committed, and it was resolved, that he should be tryed by a Jury of *Surrey*, for 5 *Eliz.* 1. § 9. *N* 3. extendeth to the Indictment only, and leaveth the tryal to the Common Law, which appoints it to be where the Offence was committed, for regularly by the Common Law, *debet quis Juri subjacere ubi deliquit*, 6 and 7 *Edw.* 6. *Dyer* 234. 3 *Inst.* 34.

3. So that the Jury on 5 *Eliz.* 1. § 9. *N.* 4. is to indict and not the Sheriff, as is mistaken in the late additions to *Dalton* 184. *cap.* 81. § 11.

XLIII. *Treason.* Page 42. *Savil.* 46, 47. *pl.* 99. *Slade* and *Body* were condemned in a *Premunire* upon 5 *Eliz.* 1. § 2. *N.* 1. before Justices of *Oyer* and *Terminer* for the extolling the authority of the Bishop of *Rome*, and remained in Prison, for the space of two years, and afterwards were brought to the Assizes, and demanded whether they were still of the same opinion, to which they answered, that they were, and one of them said, that if they had a thousand lives, they would lose them all in this Case; upon which they were indicted, and arraigned, and convicted, upon 5 *Eliz.* 1. § 10. *N.* 2. for High Treason, and it was resolved by the greater part of the Justices, that the words should be taken to be spoken advisedly and wittingly, and were within the meaning of this second Branch.

XLIV. *Parliament.* Page 44. Upon 5 *Eliz.* 1. § 16. *N.* 2. the King cannot dispence with any Member of the Commons House from taking this Oath of

of Supremacy for the reaſon in *Vaughan* 355. *Thomas* and *Sorrels* Caſe, becauſe by this Statute he is *perſona inhabilis*, until he hath taken it, *Infra* 258.

Page 44. Altho by this Act 5 *Eliz.* 1. § 17. *N.* 1. no temporal perſon, of or above the degree of a Baron is compellable to take this Oath, yet if he be made a Juſtice of Peace, he ought to take it by force of 1 *Eliz.* 1. § 19. *N.* 1. *Jones* 152, 153. the Earl of *Lincolnes* Caſe. XLV. *Priviledge.*

Page 44. By theſe words temporal perſon in 5 *Eliz.* 2. § 14. *N.* 1. and the Preamble, foraſmuch, &c. Arch-Biſhops and Biſhops, altho their poſſeſſions be tempoſalties are excluded out of this Proviſo, and therefore are to take the Oath, for every perſon, who is of the degree of a Baron is not excuſed, as *Wingate Crown* 29 miſtakes, but only the temporal Lords of Parliament. XLVI.

Page 45. So that every Clergy man or Perſon in Orders is not within the danger of this Law of 5 *Eliz.* 1. § 20. *N.* 1. upon the ſecond tender and refuſal of the Oath of Supremacy, as *Wingate Crown* 30. miſtakes, for every Prieſt or Miniſter is *Clericus*, 3 *Eliz. Dyer* 203. *pl.* and yet ſhall not incur the penalty of High Treaſon upon the ſecond refuſal, unleſs he be a local Miniſter, or have ſome charge, Cure, or Office in the Church. XLVII. *Incumbent.*

Page 45. Upon 5 *Eliz.* 1. § 20. *N.* 3. Ordinary in the Common Law is properly taken for the Biſhop of the Dioceſs, but yet uſually in the Common Law, and in Statutes for XLVIII. *Ordinary.*

for every Commiſſary and Official of the Biſhop or other Judge, that hath ordinary Juriſdiction within his limits in Cauſes Eccleſiaſtical, *W.* 2. *cap.* 19. and 31. *Edw.* 3. 11. *Termes de la Ley* 212. *verbo* Ordinary 1 *Inſt.* 344 and 8 *H.* 6. 3.

XLIX. *Religion.* **Page** 45. Upon 5 *Eliz.* 1. § 20. *N.* 5. if a man once in his life time heareth private Maſs, it ſeems he is within this qualification, and incurs High Treaſon upon the ſecond refuſal of the Oath, and not only if he uſed to hear it, as *Wingate Crown* 30. interprets the Statute.

L. *Corn.* **Page** 46, 47. The Judgment in a *Præmunire*, is to be out of the Kings protection, his Lands, Tenements, Goods, and Chattels to be forfeited to the King, and that his body ſhall remain in Priſon at the Kings pleaſure, 1 *Inſt.* 129, 130. *Raſt. Entr.* 466. *Tit. Judgment* 3. *Inſt.* 218.

2. But his intailed Lands he ſhall forfeit only during his life, for this forfeiture muſt be underſtood of ſuch an Eſtate as he may lawfully forfeit, and the general words of the Statute of *Præmunire* 16 *Rich.* 2. § 2. *N.* 7. *ſcil.* Lands and Tenements ſhall not take away the force of the Statute *de donis conditionalibus*, 13 *Ed.* 1. *W.* 2. *cap.* 1. § *N.* 1 *Inſt.* 130, 131. *Godbolt.* 308. *pl.* Lord *Sheffeild* and *Ratcliffe.* 11 *Cook* 63.

3. And the perſon Attainted in a *Præmunire* is diſabled to be a witneſs in any Cauſe, 1 *Inſt.* 6. or to ſue, for Attainder in a *Præmunire* is a good Plea in diſability of the

the Plaintiff, according to *Littleton* 41.

4. By the Statute of 25 *Ed.* 3. *St.* 5. *cap.* 22. § 1. *N.* 2. which ſaith, that a man attainted in a *Præmunire* ſhall be out of the Kings Protection, and 25 *Ed.* 3. *St.* 5. § 1. *N.* 3. It may be done with him as with the Kings Enemy. It ſeemeth, that any man might have lawfully ſlain ſuch a perſon as was held 24 *H.* 8. *Coron. Br.* 196 2 *Bulſtrode* 299. Sir *Anthony Mildmayes* Caſe, and this Sir *Edw. Cook* 7 *Cook* 14 in *Calvine's* Caſe, and 12 *Cook* 38. ſeemeth to allow for Law before this Statute of 5 *Eliz.* 1. § 21. *N.* 1. and poſitively affirms it to have been the Law in 1 *Inſt.* 130. and yet in the ſame Caſe of *Calvin*, 7 *Co.* he ſaith that 25 *Ed.* 3. *St.* 5. *cap.* 22. § 1. *N.* 2. is intended only a legal Protection, according to *Littleton* 41, and ſo likewiſe he expounds it, in 3 3 *Inſt.* 126. But yet that the Party attainted was ſtill under that Protection, which the Law of Nature giveth to the King, which he explains to be ſuch a Protection, as a Perſon attainted of Felony or Treaſon is under, notwithſtanding his Attainder, ſo that if any man had kill'd him without warrant, he ſhould have been puniſhed by Law as a man ſlayer, and this ſort of Protection by the Law of Nature, ſaith he, is *indelibilis & immutabilis*, which the perſon could not take away, but yet under favour, if a man attainted in a *Præmunire* were before 5 *Eliz.* 1. § 21. *N.* 1. under that indelible and immutable protection of the King, given by the

Law

Law of nature then the opinion *Coron. Brook* 196. and allowed by himself was not Law, but if that opinion *Coron. Brook* 196. were Law, and any man might before 5 *Eliz.* 1. § 21. *N.* 1. have killed a man attainted in a *Premunire*, and that by force of 25 *Ed.* 3. *Sta.* 5. *cap.* 22. § 1. *N.* 3. It followeth that the Protection which the Law of Nature giveth, is not *Indelebilis* or *Immutabilis*, but that an Act of Parliament might in a particular Case take it away, but there is now no further need of this question in the Case of a *Premunire*, for if this protection by the Law of Nature were taken away by 25 *Ed.* 3. *Stat.* 5. *cap.* 22. § 1. *N.* 3. It is now restored by this Statute 5 *Eliz.* 1. § 21. *N.* 1. And no man can lawfully slay a person attainted in a *Premunire*, no more than he can, without Warrant, a man attainted of Felony or of Treason.

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13 Eliz. 2.

Of BULLS.

LL Page 50. Upon 13 *Eliz.* 2. § 2. *N.* 1. a man absolves or reconciles or is absolved or reconciled to the Pope or See of *Rome* without any Bull writing or Instrument to that purpose: This Case seemeth not to be with-

within the meaning of this Statute, for there must be some Bull, Writing or Instrument to Authorize such Absolution or Reconciliation, or the person who gives or receives it is not punishable by this act, altho he may be by 23 *Eliz.* 1. § 2. *N.* 1. and 3 *Jac.* 4. § 22. *N.* 1.

Page 51. Note all concealers of this offence are not within the danger of this Law 13 *Eliz.* 2. § 5. *N.* 1. as *Wingate Crown* 35. misrecites, and therefore if a man be present at such offer, motion or perswasion, and conceal it, he shall not incur Misprision of Treason unless he be the party to whom any such Bull &c. or Absolution &c. was offered. LII. *Accessary.*

Page 52. Upon 13 *Eliz.* 2. § 7. *N.* 1. A man brings into the Kings Dominions such *Agnus Dei*, or other like superstitious things and another offers and delivers them; It seemeth that neither he that brings them in nor he that offers or delivers them is within this Act or lyable to the penalty for 13 *Eliz.* 2. § 7. *N.* 2. By the express words it must be the same person: So that neither the bringer in, unless he offer and deliver them or Cause them to be delivered, nor he who delivers them or offereth them to be delivered, unless he be the person who brought them in, is an offender within this Act. LIII. *Ouster le mere.*

Page 52. Vpon 13 *Eliz.* 2. § 7. *N.* 2. The offer or delivery of such *Agnus Dei* or other superstitious things to any sort of person is not an offence within this act, as *Wingate* Crown 37. supposeth it to be, but to make LIV. *Alien.*

make it an offence, it must be delivered or offered to a subject of this Realm or of the Dominions of the same.

LV. *Intendment.*

Page 52. 53. Upon 13 *Eliz.* 2. § 7. *N.* 3. The intent is material in this Case, and therefore if a man be indicted upon the Statute for bringing in and offering or delivering such *Agnus Dei, &c.* or receiving the same, the intent must be mentioned in the Indictment as it must be in Indictments upon all Statutes where the intent as here is made part of the offence, so in an Indictment upon 5 & 6 *Ed* 6. 4 § 3. *N.* 1. It is not enough to say the party drew his Dagger in the Church against *I. S.* but it must be averred that he did it with an intent to strike him, as was resolved by the Court of *B. R.* 33 *Eliz.* in *Penhalls* Case 4 *Leonard* 49. *pl.* 127.

It seemeth by the words of 13 *Eliz.* 2. § 7. *N.* 3. That to make the Receiver of such superstitious things an offendor within it, there must be a Concurrence of intentions, for the using or wearing them both in the giver and receiver, and that therefore if a person coming from beyond the Seas brings into this Realm any such superstitious things, but with no intent they should be worn or used, and gives them to his friend, at his request, who receives them with an intent to wear or use them, this is penal to neither.

Not to the giver, for he had no superstitious intent, and the intent is material; nor to the receiver, for that the offering or delivering them to be worn or used, is expresly

preſly made in the Statute 13 *Eliz.* 2. § 7. *N.* 2. a condition precedent to the obliquity of the fact in receiving them; for the Statute 13 *Eliz.* 2. § 7. *N.* 3. ſaith, then as well the perſon ſo doing as alſo every other perſon receiving thm to that intent ſhall incurre a *Præmunire*, ſo that then only when the perſon delivering them, ſo doth, that is delivers them to be worn or uſed, the perſon receiving them to that intent ſhall incurre a *Præmunire*.

But yet there needs not any ſuch concurrence of intentions in the giver and receiver to make the giver an offender, and therefore if a man brings into the Realm ſuch ſuperſtitious things and delivers them to be worne or uſed, thor he party receive them not to the intent to uſe or wear them, but defaces, burns or otherwiſe deſtroyes, yet he that gave or delivered them incurrs a *Præmunire*, for the words in the act 13 *Eliz.* 2. § 7. *N.* 2. rolating to the offerer or deliverer are intire in themſelves and have no dependence on the ſubſequent words 13 *Eliz.* 2. § 7. *N.* 3. relating to the receiver, but generally make all offenders who bring them in, and either offer or deliver them to a ſuperſtitious intent, without any reſpect to the intent of the party who receives or is offered them.

Page 54. Upon 13 *Eliz.* 2. § 8. *N.* 1. If the perſon to whom ſuch *Agnus Dei, &c.* Is offered, do bring the offender to any Juſtice of Peace of the County where the offer is made, altho he be not the next Juſtice, yet it is good enough and ſatisfieth the intent of this a^t, LVI. *Juſtices.*

for the word (next) is put in such cases into acts of Parliament but for conveniency and the more speedy Execution of Justice. *Styles*, 246. *pl. Maine* and *Sergeants* Case.

LXVII. *Justices.* Page 54. The Statute 13 *Eliz.* 2. § 8. *N.* 1. provides for the discovery of the offender in order to his punishment in three Cases, 1. If any such superstitious thing be offered and the party be able to apprehend him that offers it, he must bring him to the next Justice of Peace of the County where the offer is made.

2. But if he cannot apprehend him, he is to disclose his name and place of abode or resort to the Ordinary of that Diocese, or a Justice of Peace of that County, where the person to whom the offer was made is resident, and that within three dayes after such offer made.

3. But 13 *Eliz.* 2. § 8. *N.* 2. If he receives the thing offered, then he is not to apply to the Ordinary, but is strictly tyed to deliver it within a day after, to some Justice of Peace of that County where he who received it shall then be Resident or happen to be, and in this last Case if he receives it with an intent to use or wear it, and keeps it above a day, or delivers it to any other person or Justice of Peace or any other County he incurrs a *Præmunire*.

But these Justices of Peace are strangely confounded, as well in *Dalt.* 229. *cap.* 89 *tit.* high Treason, as in *Wingate*, *Crown*, 37 *Lambert* 194. 195.

LXVIII. Page 56. Upon 13 *Eliz.* 2. § 10. *N.* 1.

(As

(*As is aforesaid.*) So that if the offence be not declared as is aforesaid, that is, to such Justice of Peace as is appointed in 13 *Eliz.* 2. § 8. *N.* 1. but it shall be declared to any other Justice of Peace of a wrong County, that other Justice of Peace shall not incurre a *Prémunire*, if he doth not signifie or declare it to a Privy Counsellor.

Here 13 *Eliz.* 2. § 10. *N.* 1. 'Tis plain that any one Privy Counsellor sufficeth, and the Justice of Peace is not bound to signifie the offence to the Privy Council, as *Wingate Crown* 138. misrecites the Statute.

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23 Eliz. 1.

Of CHURCHES.

LXXIX. *Conspiracy.*

Page 58. upon 23 *Eliz.* 1. § 2. *N.* 1. It was held *Mich.* 12 *Jac.* in *Loult* and *Faulklands* Case 2 *Cro.* 357. 358. and 2 *Bulstrode* 271. (253.) and 1 *Rol.* 209. *pl.* 49. that if a man were indicted for endeavouring and practising *voluntarie*, *felonice*, & *proditorie*, to perswade and withdraw any of the Kings Subjects from his obedience unto the *Romish* Religion, and was afterwards, *debito modo acquietatus*, yet an Action upon the Case in Nature of a Conspiracy would not lie against the party who procured him to be

Indicted, and the main reason given was, that forasmuch as every man is bound to discover Treason, and 'tis dangerous to conceal any thing which may tend to Treason, therefore the procuring one to be Indicted concerning it, was no Cause of Action: And *Coke* Chief Justice said that such an Action was never brought before that time. But later Resolutions have been to the contrary of this opinion, and 'tis held for Law at this day, that if a man procures another to be Indicted of High Treason, an Action upon the Case in nature of a Conspiricy lieth against him that procures it, as well as if it were for Felony; the first leading Case of this nature, which was resolved upon solemn argument or debate was that of *Hil.* 1. *Car.* 1. of *Smith* and *Crashaw* &c. addition to *Bendloes* 152. *Latch* 79. 80. *Jones* 93. 94. 95. Where it was adjudged upon great deliberation by all the four Judges of *B. R.* that an Action in nature of a Conspiracy doth well lie in such Case, and that not only in Case of acquital upon Tryal, but upon the Exhibiting a Bill of Indictment for High Treason to the Court or Jury, if the Jury bring in *Ignoramus*, altho in this last Case a Writ of Conspiracy lyeth not; and *Lovets* Case was denyed to be Law: and Justice *Dodderidge* who concurred 2 *Bulstrode* 271 (253) changed his opinion in *Smiths* Cas, and held the Action maintainable, so that whosoever of meer malice without probable cause causeth any to be Indicted on 23 *Eliz.* 1. § 2. *N.* 1. or on 3 *Jac.* 4. § 22.

N.

N. 1. for endeavouring or practiceing ſo to perſwade or withdraw any Subject, or preferſ a Bill to the Court or Jury for that purpoſe, is lyable to an Action upon the Caſe for ſo doing, if the party be acquitted, or the Jury bring in *Ignoramus*, as in other Caſes of Felony.

Page 59. Theſe words (**And ſhall not within twenty dayes &c. diſcloſe the ſame**) 23 *Eliz.* 1. § 3. *N.* 1. have no reference to thoſe who are aiders and maintainers of the offender, but only to thoſe who have barely a knowledge of the offence without aiding or maintaining the party. LX. *Acceſſory.*

And therefore if ſuch as are aiders or maintainers of the perſon offending diſcover the offence within twenty daies, yet ſuch diſcovery ſhall not free them from the guilt of Impriſonment of Treaſon, as *Wingate Crown* 42. miſtakes, but if they once aid or maintaine the party, knowing him to be an offendor, they are guilty whither they diſcloſe or conceal the offence and ſhall have no benefit of the twenty dayes.

Page 60. Upon 23 *Eliz.* 1. § 5. *N.* 1. *Moor* 606. *pl.* 838. *Talbot* was Indicted, *quod exiſtens etatis 16 annorum & amplius non acceſſit ad Eccleſiam. &c.* The queſtion was, whether the *Exiſtens*, &c. Should refer to the time of his Indictment or to the time of his abſence. And the Judges conceived that the Indictment was well enough and purſuant to the Statute, and that *Exiſtens* ſhould in this Caſe LXI. *Enfant.*

refer to the time of his abſence.

LXII. *Lien.* **Page** 60. Upon 23 *Eliz.* 1. § 5. *N.* 1. this offence (**Not repair, &c. but forbear &c.**) conſiſts not in committing but in omitting, and is but a nonfeaſance, and therefore cannot be laid to be in any certain place, and for this reaſon in a popular action brought by the Informer, *qui tam, &c.* there needs no place be alledged in the Declaration, *Anderſon*, 139. *pl.* 109. *Cuff* againſt *Vachel.*

Nor is Recuſancy within 31 *Eliz.* 5. § 2. *N.* 1. which ſayeth that the offence ſhall be laid in the proper County where it was done or committed, for to ſpeak properly it was not committed any where, *Hobart* 251. *pl. Grimſtone verſus Molineux. infra*, 79. § 6.

LXIII. *Proof.* **Page** 60. 61. By this **Being thereof lawfully convicted.** 23 *Eliz.* 1. § 5. *N.* 1. Is not ment that the party muſt be Convicted in ſome former ſuit, but a Conviction upon the ſame Indictment or Information which is brought againſt him, for the recovery of the 20 *l. per* month is ſufficient conviction within the meaning of this Statute: And ſo are all penal Statutes which have in them thoſe words (being thereof lawfully Convicted) to be underſtood, that is of a conviction in the ſame ſute whereupon the penalty is to be recovered, for the meaning only is that the offendor ſhall forfeit nothing before Conviction, which is no more than the Law implyeth, and therefore in truth theſe words are but ſuperflous, and might as well have been omitted, 11 *Co.* 59. & 1 *Rolls*

Rolls 90. *pl.* 41. Dr. *Fosters* Case, and 1. *Rolls* 234. *pl.* 6. and 3. *Bulstrode* 87. the King against *Lane*.

2. Nor is Conviction intended here 23 *Eliz.* 1. § 5. *N.* 1. only of a Conviction by Verdict, and therefore if the offendor be convicted upon his confession of the Fact and Judgment thereupon be had, and consequently if Judgment be had against him upon a demurrer, which is a Confession of the matter of Fact, Or if Judgment be given against him on *nihil dicit*, for any other Cause, any of these are sufficient Convictions whereupon to recover his penalty; for Convicted is here 23 *Eliz.* 1. § 5. *N.* 1. to be taken for attainted, as tis in many other Cases, for until Judgment he shall forfeit nothing, and altho he that is convicted is not therefore attainted, yet every one who is attainted or adjudged is Convicted, and of such a Conviction is this Statute to be understood. *infra*. 233.

LXIV. *Forfeiture.*

Page 61. These words (To the Queens Majestie.) In 23 *Eliz.* 1. § 5. *N.* 1. are but surplusage, and import no more than the Law would have given the Queen without them, for where a Statute gives a forfeiture, and limits not to any particular person, the King shall have it by construction of Law, as was agreed 2 *Anderson* 128. *pl.* 73. in the Case of *Agard* and *Tandish*, and so should he have this whole 20 *l. per* month if the Statute had staid here, and had not afterwards made another express appointment *infra*, 76.

LXV. *Dayes.*

Page 61. 62, 63. It ſeemeth that the month here 23 *Eliz.* 1. § 5. *N.* 1. mentioned ſhall be accounted *ſecundum numerum ſingulorum dierum*, allowing but 28 daies to a month, for ſo are all Statutes to be underſtood which ſpeak of the month, unleſs *W.* 2. *cap.* 5. § *N.* for the account of a Lapſe and 2 & 3 *Ed.* 6. 13. § *N.* of proving a ſuggeſtion 1. *Inſt.* 135. & 2 *Co.* 166. *Telverton* 100 *Hob.* 179. (*ſupra pl.* 7.) and of this opinion the Court of *B. R.* ſeemed to be upon the Conſtruction of the Statute of Liveries 8. *Ed.* 4. 2. § 2. *N.* 3. in the Caſe of *Donner* and *Smith*, 3. *Co.* 835. *pl.* So that by this account the Recuſant ſhall forfeit thirteen ſcore pounds in the whole year.

2. In an Information 2 *Cro.* 529. *pl.* brought by *Parker*, *Qui tam*, &c. againſt Sir *John Curſon* and his Wife for the Recuſancy of the Wife for 11 months, and not guilty pleaded, it was proved at the Trial, *Paſch.* 17. *Jac.* in *B. R.* that ſhe conformed and came to Church for part of the time in the Information, yet foraſmuch as ſhe was a Recuſant both before and after, it was ſaid by the Court that her Conformity for ſome part of the time ſhould not excuſe her, and ſhe was found Guilty for the whole time.

3. The Informer ſhewed that the Recuſant was abſent from Church from the 10 *September* 15. *Jac.* unto 9 *September*, 16. *Jac.* and demanded Two hundred and twenty pounds for eleven months, upon not Guilty pleaded, it was found againſt the Defend-

ent

ent, and it was reſolved that altho the Informer had demanded leſs than by his own ſhewing was due (for the time mentioned in the Information was 13 months compleat Except one day) yet the Information was well enough, for the Recovery ſhall be intended to be for the eleven months, when the Recuſant was firſt abſent, and the Addition of more is not material 2 *Cro.* 529. and 2 *Roll.* 90. *Parker* againſt Sir *John Curſon* and his Wife, and this is not like the Caſe of 1 *Cro.* 331. *Bawderock* and *Mackaller*, *Mich.* 9. *Car.* 1. where the Informer *Qui tam*, &c. Upon 31 *Eliz.* 6. of Symony demanded leſs than the penalty, and the Court ſeemed to be of opinion that altho it was good enough for the King notwithſtanding that miſpriſion, yet it was not ſo for the Informer, and compared it to the Caſe of *Agard* and *Candiſh*, where an Information was brought upon the Statute of liveries after the year, and it was adjudged to be good for the King but not for the Informer, for upon 31 *Eliz.* 6. § *N.* which gives one intire penalty for the offence, if leſs be demanded the Statute is not perſued, and there is a clear variance between that and the Information, but in the Caſe of Recuſancy when he demands Two hundred pounds for eleven months the Statute 23 *Eliz.* 1. § 5. *N.* 1. is perſued, and tho it appear by the Information that the Recuſant was abſent for a longer time, yet the Informer is at liberty whither he will demand the penalty for his abſence during that

that Supernumerary time.

4. If it be ſhewed in the Information that the Recuſant was abſent from Church from a day certain to a day certain, which in all makes 13 months, and the penalty is demanded for that time, and the Jury find the party Guilty for 12 months, it hath been held by ſome that the Verdict ſhall be good for 12 months, but whether for the firſt 12 months is a Queſtion, for in Sir *J. Curſons* Caſe 2 *Cro.* 529. the demand was but for 11 months, and when the Jury finds the defendent guilty, it ſhall be intended to be for the 11 months for which the penalty is demanded, and that ſhall be accounted from the 10 *September* which was the firſt day of abſence alledged in the Information, and the reſt of the time to the 9 *September* following after the firſt 11 months is to be accounted as ſurpluſage.

But in this Caſe on 23 *Eliz.* 1. § 5. *N.* 1. where the Jury abridgeth the time for which penalty is demanded, it may be queſtioned whither the Verdict ſhall be intended to be for the firſt 12 months of the 13. and the Judges of *B. R.* to ſalve a Caſe of the like nature 3 *Cro.* 835. ſeemed to be of opinion and 8 *Ed.* 4. 2. § 2. *N.* 3. that it is not material which were the 12 months wherein the party offended, but if that opinion be law, it muſt follow that the party can never be puniſhed for the 13 month, but that muſt be remitted to him becauſe its left uncertain which of the 13 ſhall be accounted the month not found

found by the Jury, and it rather seems for this reason, that the Verdict is void for the uncertainty which 12 months of the 13 the party offended, unless it shall be intended of the first 12.

5. Mr. *Shephard* in his sure Guide *cap. 6. Sect.* 5. Raiseth this question, *viz.* 23 *Eliz.* 1. § 5. *N.* 1. having reference to 1 *Eliz.* 2. § 14. *N.* 1. which sayeth every one shall come to Church every *Sunday* and *Holy-day*, whither he that is not at Church every *Holy-day* doth not *rigore juris* forfeit 20 pound a month by force of 23 *Eliz.* 1. § 5. *N.* 1. but this question seems altogether needles, for tis clear by the expres words of 23 *Eliz.* 1. § 5. *N.* 1. that it must be a forbearance from Church for a whole month together that makes the party liable to the forfeiture of 20 *l.* and if he comes to Church on any *Sunday* or *Holy-day*, within the month, he is freed from the penalty of 20 *l.* altho not from the 12*d.* and by 1 *Eliz.* 2. § 14. *N.* 1. for the dayes of his absence if he comes not every *Sunday* and *Holy-day* both.

LXVI. *Behaviour.*

Page 63. 64. Upon the words, **Be bound.** in 23 *Eliz.* 1. § 5. *N.* 2. Some have made a question and among them Mr. *Shephard* in his Sure Guide, *cap. 6. Sect.* 5. by whom or in what Court the Recusant shall be bound to the good behavior by force of this Statute, for that the Court is not expresly mentioned, and *Wingate Crown* 44. hath stumbled upon a conceit that after certificat made in *B. R.* a Justice of Assie, Goal delivery,

delivery, or Peace ſhall bind the party to the good behavior, and miſrecites the Statute accordingly, but it ſeemeth the intention of the Law makers was that he ſhould be bound in *B. R.* and of that opinion is *Dalt.* 192 § 5 *cap.* 79 *tit.* good behaviour.

2. For where any proceedings are appointed to be upon or after a certificate ſent to any Court, there by common intendment the proceedings are to be in that Court to whom the Certificate is ſent, if no other Court be named, and it cannot be preſumed by any reaſonable conſtruction of 23 *Eliz.* 1. § 5. *N.* 2. That the Certificate into *B. R.* is to any other end than for the Juſtices there to proceed in ſuch manner as the Act directs to be done after ſuch Certificate, as no queſtion they may in this Caſe as well as upon Certificate of a preſentment or of refuſal of the Oath of Supremacy againſt 5 *Eliz.* 1. § 5. *N.* 10. *Supra* 39. and tis a rule in Conſtruction of Statutes, that where the intention plainly appears, the Law ought to be advanced according to its end, tho the words be ſhort and imperfect, eſpecially Laws made for Religion, as is held *Hob.* 157. and 11 *Co.* in *Magdalen Colledge* Caſe and 2 *Bulſtrode* 155.

3. Popiſh Recuſants convicted are not to be reputed ſufficient ſureties within 23 *Eliz.* 1. § 5. *N.* 2. and therefore were refuſed by the Court of *B. R.* in the Caſe of *Griffith* 2 *Bulſtrode* 155.

LXVII. *Schools.*

Page 64. An uſher or aſſiſtant in teaching

ing is a Maſter in the School, and ſeemeth to be included within the word School-Maſter 23 *Eliz.* 1. § 6. *N.* 1. and the following words here (or teacher) explain who is intended (*viz.*) Every teacher of youth 23 *Eliz.* 1. § 7. *N.* 2.

Page 64. 65. This Clauſe, repair to Church as is aforeſaid or be allowed 23 *Eliz.* 1. § 6. *N.* 1. being in the diſ-junctive, it ſeemeth that altho a School-Maſter doth not come to Church, yet if he be Licenſed by the Biſhop, or Ordinary, it ſhall excuſe the penalty, and this is not altered in that particular either by 1 *Jac.* 4. § *N. infra* nor by 13 and 14 *Car.* 2. 4. § 11. *N.* 1. but then he muſt by 13 and 14 *Car.* 2. 4. § 11. *N.* 1. &c. Among other things ſubſcribe a declaration or acknowledgment that he will confirm to the Liturgy of the Church of *England* as it is now by law Eſtabliſhed, or he ſhall for the firſt offence ſuffer three months impriſonment without bail, and for the ſecond and every other offence ſhall ſuffer three months impriſonment without bail, and alſo forfeit *V. li.* LXVIII. *Licence.*

2. But if he be licenſed and ſubſcribe and do as aforeſaid, and ſo cannot be puniſhed by 23 *Eliz.* 1. § 6. *N.* 1 or either of the other ſaid acts, yet now by 17 *Car.* 2. 2. § 4. *N.* 1. unleſs he take the Oath there mentioned and frequent Divine ſervice Eſtabliſhed by the Laws of this Kingdom, and carry himſelf there as the ſaid Statute is appointed, he ſhall forfeit for every offence ten pound *li.* ſo that now

now conformity in repairing to Church is is necessarily required of every such Schoolmaster.

3. But now by 13 and 14 *Car.* 2. 4. § 11. *N.* 1. There may be 12 pence taken for such licence notwithstanding 23 *Eliz.* 1. § 7. *N.* 1.

LXIX. *Dayes.* Page 65. 66. This limitation of time within one year and day 23 *Eliz.* 1. § 8. *N.* 1. extends not to any offence made Treason by 23 *Eliz.* 1. but only to such offences mentioned in this act or 1 *Eliz.* 1. 2. and 5 *Eliz.* 1. and 13 *Eliz.* 2. as concern the Kings Supremacy in Causes Ecclesiastical, the service of God coming to Church, or Establishment of Religion.

2. And for those touching Religion 23 *Eliz.* 1. § 8. *N.* 1. enlargeth the time limited by 1 *Eliz.* 2. § 20. *N.* 1. which saith the party must be Indicted the next Sessions or 1 *Eliz.* 2. § 22. *N.* 1. If in a Corporation within fifteen dayes after *Easter* or *Michaelmas*: for now he may be Indicted at any time within the year and day.

3. But for absolving or withdrawing, or for being absolved withdrawn or reconciled, which are 23 *Eliz.* 1. § 2. *N.* 1. made Treason, no time is limited for the perfection, but the offender may be Indicted at any time after the year and day, for the latter part of 23 *Eliz.* 1. § 8. *N.* 2. Speakes of those offences of Treason which the Justices of Peace cannot hear and determine, and there no time is limited, altho there be in the former part 23 *Eliz.* 1. § 8. *N.* 1 for those offences

fences which are inquirable by Justices of Peace 1 *Leonard* 238. *pl.* 322. *Guilfords*, Case.

Page 66. 67. upon 23 *Eliz.* 1. § 9. *N.* 1. The Justices of the Court of *B. R.* are the Soverain Justices of *Oyer* and *Terminer*, and Goal-delivery 9 *Co.* 118. Lord *Sanchars* Case, and therefore may enquire of, hear and determine the offences against this Act, altho they be not here especially named. LXX. *Justices.*

2. If an Indictment be preferred upon this Statute 23 *Eliz.* 1. § 9. *N.* 1. before Justices of *Oyer* and *Terminer*, or of Assie, for any offence not made Treason or misprision, and there is an Indictment before Justices of Peace likewise for the same offence, the Judgment of the Justices who do first enquire hear and determine the same shall stand, and the Judgment given by the other shall be void, as was held in the like Case. 2 *Inst.* 739. upon 31 *Eliz.* 7. § *N.* of Inmates.

3. The Power here given 23 *Eliz.* 1. § 9. *N.* 2. The Justices of Peace in their open Quarter Sessions to hear and determine the offence of not coming to Church is in force at this day, notwithstanding 29 *Eliz.* 6. § 2. *N.* 2. which saith that every conviction for not coming to Church shall be in *B. R.* or at the Assizes or General Goal-delivery, and not elsewhere; for 3 *Jac.* 4. § 7. *N.* 1. hath given power to Justices of Peace in their General or Quarter Sessions to enquire hear and determine of all offences for not coming to Church according to former Laws in such manner as the Justices of Assize and Goal

Goal delivery might do by former Laws in the Case of Recusancy for not repairing to Church, which is clearly a reviver of the power of Justices of Peace given to them by 23 *Eliz.* 1. § 9. *N.* 2. to proceed against Recusants, and taken from them by 29 *Eliz.* 6. § 2. *N.* 2.

4. Nor doth that following Clause 3 *Jac.* 4. § 7. *N.* 2. Touching Conviction by proclamation impeach this, or restrain the Justices of Peace to proceed to conviction upon proclamation only and default of appearance, no more than the Justices of Assize or Goal-delivery are restrained thereby or by 29 *Eliz.* 6. § 2. *N.* 5. which gives them likewise Authority to proceed by Proclamation.

5. For these Clauses of 3 *Jac.* 4. § 7. *N.* 1. 2. are in the Affirmative, *viz.* first that the Justices of Peace shall have power to hear and determine the offence of not coming to Church according to Laws in such manner as Justices of Assize and Goal-delivery might do, and those Justices might hear and determine that offence according to this Statute 23 *Eliz.* 1 § 9. *N.* 1. and then comes the next Clause of 3 *Jac.* 4. § 7. *N.* 2. That the Justices of Peace shall have power to convict by proclamation which is purely affirmative also, and therefore abrogates no part of the power given them by the former Clause of 3 *Jac.* 4. § 7. *N.* 1. and this agrees with what Sir *Ed. Coke* saith 12 *Co.* 13 that if a man be Indicted for Recusancy at the Assizes or Sessions

ſions of the peace, the Court may waive the proceedings by proclamation upon 3 *Jac.* 4. § 7. *N.* 2. And may ſtill if they pleaſe proceed againſt the party by proceſs upon this Statute 23 *Eliz.* 1. § 9. *N.* 2. in which Caſe the proceſs muſt be by *Venire facias, capias*, &c. As in Indictments of treſpaſs, and if ſaith he the party be fugitive in another County, the Indictment may be removed in *B. R.* and then proceſs may be there made out againſt him into any County of *England*.

LXXI. *Juſtices.*

Page 67. Upon 23 *Eliz.* 1. § 9. *N.* 2. by Quarter Seſſions, is intended here only the Seſſions of the Peace, held at four times of the year and not any other, altho it be general Seſſions.

2. And therefore the Juſtices of Peace in *London*, who hold a Seſſions every month, cannot take Indictments upon this Statute 23 *Eliz.* 1. § 9. *N* 2. at any of them, unleſs it be the Quarter Seſſions: For that their Authority is given them only at a certain time, as was reſolved upon 5 *Eliz.* 9. § 9. *N.* 1. in the like Caſe, *Mich.* 17. *Jac. B. R. Palmer* 44. *pl. Taylors* Caſe.

3. And 3 *Jac.* 4. § 7. *N.* 1. which gives Juſtices of Peace power to take Indictments of Recuſancy at their general or Quarter Seſſions, for ſo the word (ſaid) there imports, having reference to the general or Quarter Seſſions mentioned before 3 *Jac.* 4. § 4. *N.* 2. about preſentments, yet doth not enlarge the power of the Juſtices of Peace in

this particular, nor enable them to take such Indictments at any Sessions, but at their four Quarter Sessions: for altho it be put there 3 *Jac.* 4. § 4. *N.* 2. disjunctively, General or Quarter, yet the latter word is but Explicative of the former, and shews what general Sessions are meant, as appears by 3 *Jac.* 4. § 14. *N.* 1. and 7 *Jac.* 6. § 26. *N.* 5. touching the Oath of Allegiance; for in 3 *Jac.* 4. § 14. *N.* 1. tis said that if the party refuse the Oath he shall be committed to Goal, until the next Assizes or general Quarter Sessions, and if he refuse the Oath tendred him by the Justices of Assize and Goal-delivery in their oper. Assizes, or by the Justices of Peace in their said general Quarter Sessions, he shall incurre a *Præmunire*; and in 7 *Jac.* 6. § 26. *N.* 5. that the party refusing shall be committed to Goal until the next Assizes, or general Quarter Sessions, and if he refuse the Oath tendred him by the Justices of Assizes and Goal-delivery in their open Assizes or Goal-delivery, or the Justices of Peace, or the greater part of them in their general or Quarter Sessions, he shall incurre a *Præmunire*, which clearly shews that the same thing is intended by General Quarter Sessions, and General or Quarter Sessions; and that all General Sessions which are not Quarter Sessions, are excluded out of the meaning of those Statutes.

LXXII. *Indictment.* Page 68. the Justices named in 23 *Eliz.* 1. § 9. *N.* 2. are hereby impowered to proceed

ceed by Indictment only, and no other way for they are to hear and determine after enquiry *infra*, 95. & 165.

2. And the word (Enquire) implyeth an Indictment, and is alwaies so to be expounded *supra* 35, and so are the other words hear and determine where other proceedings are not specially named, as here they are not.

3. For the Action of debt, Information, &c. in any Court of Record is given to the Informer *qui tam* &c. afterwards 23 *Eliz.* 1. § 11. *N.* 1. in a distinct branch by it self without any reference to this.

4. So that by 23 *Eliz.* 1. § 9. *N.* 2. and before 35 *Eliz.* 1. § 10. *N.* 2. which gave the Queen an Action of debt, &c. the Queen had no other remedy to recover the intire forfeitures given hereby, but by Indictment only 11 *Co.* 60. and 1 *Rol.* 91. *pl.* 41. *Dr. Fosters* Case.

5. See *Jones* 193 *pl.* for that and the suit by the common Informer are the only wayes appointed by 23 *Eliz.* 1. § 9. *N.* 2. and § 11. *N.* 1. and the subsequent Clause 23 *Eliz.* 1. § 10. *N.* 1. of submission which names the Justices before whom the party is to submit, *viz.* the Justices before whom he is Indicted, Arraigned or Tryed, shews what proceedings are meant which are to be had before the Justices here named, that is by Indictment *Hob.* 205. *Pie* and *Lovel.*

6. *Talbot* and *Skelden* were Indicted for Recusancy, *Contra formam Statuti* 23 *Eliz.* 1.

in which Indictment the penalty was demanded, and in a Writ of Error the Judgment was reverſt, for the offence is made by 1 *Eliz.* 2. § *N.* and the penalty is given by 23 *Eli.* 1. § *N.* and therefore it ſhould have been *Contra formam Statutorum*, *Owen.* 135. *pl. Weſts* Caſe *infra* 79 § 4.

Par. & Feme 7. If a Feme Covert be Indicted at the Kings Suit for an offence within 23 *Eliz.* 1. § 5. *N.* 1. ſhe may be charged with the penalty after her Husbands death, but the Husband is not chargable, nor ſhall pay the penalty, for that he is no party to the Judgment: and this was one of the Cauſes of making 35 *Eliz.* 1. § 10. *N.* 1. by which Statute the King may have an Action of debt, and recover the forfeiture againſt the Husband 1 *Rol.* 93. 94. *Roy* verſus *Feſter*, *Savile* 25 *pl.* 59.

LXXIII. *Treaſon.* Page 68. This Exception 23 *Eliz.* 1. § 9. *N.* 2. of Treaſon and miſpriſion of Treaſon extends not to the Juſtices of *Oyer* and *Terminer*, or of Aſſize and Goal-delivery, as *Wingate Crown* 46. hath miſtaken, but only to Juſtices of Peace, who are not to medle in th[illegible] two Caſes, but the other Juſtices may.

LXXIV. *onformity.* Page 69. Upon 23 *Eliz.* 1. § 10. *N.* 1. Before Judgment ſubmit and conform himſelf, &c. But now by 1 *Jac.* 4. § 17. *N.* 1. If the Recuſant conforms after Judgment, it ſeems it ſhall be time enough to have the forfeiture.

2. A man is convicted of Recuſancy according

cording to 29 *Eliz.* 6. § 2. *N.* 5. upon Proclamation and default of appearance, and afterwards ſubmits and conforms, he ſhall by force of 23 *Eliz.* 1. § 10. *N.* 1. be diſcharged of the forfeiture of twenty pounds *per* month; for this is a ſubmiſſion and conformity before Judgment, the Conviction upon Proclamation being no Judgment but only in nature of a conviction by verdict, as was reſolved by all the Judges, *Mich.* 37. and 38 *Eliz.* ſee 1 *Rol.* 94. *pl.* 41. Dr. *Foſters* Caſe.

3. **Page** 69. Certain Perſons were Indicted upon 23 *Eliz.* 1. § 5. *N.* 1. for not coming to Church, and were outlawed upon the Indictment, the Court of *B. R.* would not in this Caſe receive their ſubmiſſion, upon 23 *Eliz.* 1. § 10. *N.* 1. but adviſed them to purchaſe their pardon for the Outlawry, which they did, and the their ſubmiſſion was accepted of and they were diſcharged. 4 *Leonard* 54. *pl.* 138.

Note in the report the Statute 13 *Eliz.* 2. is miſtaken for 23 *Eliz.* 1. for no Indictment for not coming to Church lyeth on 13 *Eliz.* 2.

Page 69. Upon 23 *Eliz.* 1. § 10. *N.* 1. LXXV. *Certificate.*
If a man be Indicted for Recuſancy before Juſtices of Peace, and he ſubmits and conforms before the Biſhop of the Dioceſs, he may remove the Indictment by *Certiorari* into *B. R.* and there plead his Conformity by Certificate under the Biſhops hand and Seal *Styles* 26. *pl.*

2. For the manner of a Recusants submission and Conformity before the Bishop after Conviction, and the Bishops Certificat thereupon, see *Co. Entr.* 569.

LXXVI. *Forfeitures.* **Page 70. 71. All forfeitures of any sums of money limited by this Act.**] 23 *Eliz.* 1. § 11. *N.* 1. Shall be divided *&c.* So that the distribution here appointed extends not only to the forfeitures of Two hundered and One hundred Marks, for saying or hearing of Mass, and the ten pound a month for keeping a School-Master Contrary to this Act, but likewise to the twenty pound *per* month, for not repairing to Church.

2. In which last Case the Informer, *Qui tam*, &c. shall have the third part as well as in the other Cases, for altho by 23 *Eliz.* 1. § 5. *N.* 1. the whole Twenty pound *per* month is given to the Queen, which the other forfeitures are not in express words, yet that will not alter the Case nor make void the express appointment made here in what manner and to whom all the forfeitures limited by 23 *Eliz.* shall be disposed of.

3. And it is usual in Acts of Parliament to give the whole penalty for any Criminal matter to the King, and afterwards in the same Act to make distribution thereof, and give part to him that will sue, as in 3 *H.* 6. 3. § 1. *N.* 1. 2. and 3 *H.* 7. 7. § 1. *N.* 5. 10. and the subsequent distribution shall alwaies stand good notwithstanding the precedent words of limitation of the whole to the King.

4. For

4. For those words in penal Statutes (*To the King or to the Queen*) are upon the matter but void and superfluous, and give the King or Queen no other or stricter interest than they would have had if they had been omitted, and it had been said (*shall forfeit*) without apointing to whom.

5. And the reason is, for that the Law devolves the forfeiture upon the King, where no other person is appointed, and (*shall forfeit*) without more saying, is as much as shall forfeit to the King. But when afterwards in the same Statute a particular appointment is made how the penalty shall be, that qualifies the former and general words, and such distribution, shall be made as the Statute appoints 11 *Co.* 60. and 1 *Rol.* 89. 90. *pl.* 41. Dr. *Fosters* Case, and 1 *Anderson* 139. 140. *pl.* 190. *Cuff* and *Vachell*, *supra* 46.

LXXVII. *Poor.*

Page 71. Upon 23 *Eliz.* 1. § 11. *N.* 1. *Scot* was Indicted for Recusancy, *Anno.* 26. *Eliz.* 2 *Leonard* 167. *pl.* 204. By the name of *William Scot* of *Southwark* Gent. and Exception was taken to the Indictment, for that within *Southwark* are several Parishes, and the third part of the penalty is to be applyed to the relief of the Poor of the Parish where the offence was committed. But in this Case the Recusant being named generally of *Southwark*, *non potest constare Curiæ* where the offence was, nor to what Parish the third part of the penalty belongs. But the whole Court of *B. R.*

were there of opinion that the Indictment was good enough notwithstanding it is not said of what Parish the Recusant was: for the whole penalty of twenty pound *per* month is at first 23 *Eliz.* 1. § 5. *N.* 1. given to the Queen: and the Inhabitants of the Parish where the offence was, are by 23 *Eliz.* 1. § 11. *N.* 1. to sue in the Exchequer for their third part, and surmise in their Bill that the offence was in their Parish, and if it were so, it shall be delivered to them as the Act directs.

LXXVIII. *Exchequer.* **Page** 71. Upon 23 *Eliz.* 1. § 11. *N.* 1. the principal Officers of the Court of Exchequer are the Treasurer and Barons, but the principal Officers of the receit of the Exchequer are the Treasurer and Chamberlains, *Savile* 38. *pl.* 87.

LXXXIX. *Information.* **Page** 71. *&c.* 82. on 23 *Eliz.* 1. § 11. *N.* 1. upon a penal Statute where part of the forfeiture is given to the King, and part to him that will sue; the Informer or Plantiff *qui tam, &c. sequitur tam pro Domino Rege, quam pro seipso*, and so it must be laid in the Information or declaration, and not only there, but in the Joyning of Issue and the *Venire facias*, it must be entred, *qui tam pro Domino Rege, &c.* or the omission of it is Error 1 *Cro.* 336. *pl. Mich.* 9. *Car.* 1.

2. In an Information upon 23 *Eliz.* 1. § 11. *N.* 1. the usual way is that the Informer for himself *petit inde tertiam partem, juxta formam Statut'.* 11 *Co.* 56. Dr. *Fosters* Case, but then the Statute must be named, for in an

an Information 2 *Cro.* 142. *Mich.* 4. *Jac.* by *Broughton*, *Qui tam, &c.* against *More*, for the forbearing to come to Church *Contra formam Statuti*, without naming which Statute, in which Case the Informer demanded the third part for himself, it was adjudged by the Court of *B. R.* to be ill, for there are several Statutes against Recusancy, and it did not appear which of them was meant.

3. But if this Statute of 23 *Eliz.* 1. § 11. *N.* 1. be named in Certain, and the party who sueth demands the whole forfeiture for the King and himself, and Judgment be given that the King shall recover one moity, and the Informer or Plantiff *Qui tam, &c.* the other moity, in that Case the Judgment is well enough: for the Information or declaration being, *Quod alio accrevit Domino Regi & præfat.* A. *ad habend' & exigend'* the full forfeiture, the Judgment doth not vary therefrom, when it saith, that a moiety shall be to the King, and a moiety to the Plantiff or Informer: and altho the Statute 23 *Eliz.* 1. § 11. *N.* saith that he which will sue shall have but a third part, yet that is by way of distribution only, and such distribution if the penalty is an act subsequent to the Judgment and is to be made as well out of the moity given by the Judgment to the Informer or Plantiff, *Qui tam, &c.* as out of the mony thereby given to the King, and this I conceive to be the reason of the resolution in *Chambers*, Case 2 *Roll.* 437. *pl.* where such a Judgment in Case of Recusancy

cuſancy upon this Statute was allowed to be good.

But if the whole forfeiture be not demanded in certain, there, altho the party who ſues demands his own ſhare, 'tis ill; and ſo it was adjudged in an Information upon a pœnal Statute, 5 *Eliz.* 5. § 16. *N.* 1. which concluded, *Unde petit adviſamentum Curiæ, & quod forisfaciat* 5 *l. pro qualibet offenſ. unde ipſe petit medietatem.* For the Informer doth not make his demand certain, but leaves it to the Court or Jury to caſt up the ſum it Amounts to: *Hobart* 245. *Pie* and *Weſtly.*

Information. 4. If there be ſeveral Statutes, and each of them prohibit one and the ſame thing, and Inflict a penalty and give an Information for recovery of it; the Information may conclude *contra formam Statuti*, and good; becauſe the beſt ſhall be taken for the King. 5 *H.* 7. 17. So if one Statute make the offence, and another Inflicts the penalty or forfeiture, and the Information be for the offence only, it may conclude *contra formam Statuti*, which is to be underſtood of that Statute which makes the offence. But if the Information both lay down the offence, and demand the penalty, there both Statutes muſt be recited, or at leaſt the Information muſt conclude *contra formam Statutorum*: *Owen* 135. *Weſts* Caſe, *ſupra* 72. § 6.

5. In the late additions to *Dalt.* 547. *cap.* 191. § 6. *N.* 3. its ſaid that Informations and ſuits on penal, Statutes are *ſtricti juris*,

juris, and excepted out of all the Statutes of Jeofailes; which is a miſtake, for they are not excepted out of 32 *H.* 8. 30. Its true they are out of 18 *Eliz.* 14. § *N.* and 21 *Jac.* 13. § *N.* and that as it ſeemeth in all Caſes within thoſe two Statutes: ſee *Styles* 307. *Theoballs* againſt *Newton.*

And in the Caſe of *Scot* and *Lawes*, *Hob.* 328. It ſeems to be intimated that they are excluded out of all three: Where the Caſe was debt by an Informer, *Qui tam*, &c. upon a penal Statute 21 *H.* 8. 13. § 2. *N.* the defendent pleads *non debet prefato J.* (meaning the Informer, and not the King) and the Iſſue was found againſt the defendent; in that Caſe it was reſolved that this was a good Cauſe to ſtay Judgment, and there its ſaid that it being upon a penal Statute, the Statute of Jeofailes 32 *H.* 8. 30. would not help it, but that reaſon was *Ex abundanti*, for 32 *H.* 8, 30. ſeems to extend to all popular ſuits whatſoever; and in *Wallers* Caſe *Dyer* 346. 347. in an Information brought againſt him 18 *Eliz.* by *Topcliffe*, *Qui tam*, &c. upon 37 *H.* 8, 9. of Uſury, it was adjudged that the miſ-conveying of Proceſs, and miſ-joyning of Iſſue in the ſaid Information, were aided by 32 *H.* 8. 30. *Dyer.*

6. By 31 *Eliz.* 5. § 5. *N.* 2. an Informer, *Qui tam*, &c. muſt begin his ſuit within one year after the offence committed, otherwiſe he ſhall not have any part of the penalty 2 *Co.* 366. *Hill.* 12 *Jac. Godbolt* 158. *pl.* 216. *Sivedale* verſus Sir *Edward Leuthal*:

Lenthal: But popular ſuits upon the Statute 39 *Eliz.* 2. § *N.* of Tillage are excepted, and not upon the Statute of Tallage, as is miſtaken in the the late additions to *Dalt.* 546. *cap.* 191. § 3.

In Dr. *Foſters* Caſe, 11 *Co.* 65. its ſaid, that the Informer hath no Remedy for recovery of the forfeitures for Recuſancy after the year and day is expired, for that time is limited in certain by 23 *Eliz.* 1. § 8. *N.* 1. but yet with ſubmiſſion it ſeems that 23 *Eliz.* 1. § 8. *N.* 1. relates to Indictments only, and ſo it was held in this very Caſe of Dr. *Foſter*, 11 *Co.* 60. and 1 *Rol.* 93. *pl.* 41. and *Hob.* 205. in *Pie* and *Lovels* Caſe; and there was no limitation of time for the Informer *Qui tam*, &c. Upon 23 *Eliz.* 1. § 8. *N.* 1. until the ſaid Statute of 23 *Eliz.* 5. § 5. *N.* 2. which limits him to a year after the offence committed, and not a year and a day, and altho this offence of Recuſancy cannot in ſtrictneſs be ſaid to be committed, for that in truth it is but a bare omiſſion, as hath been ſaid *ſupra* 62. and therefore there needs not any place alledged, yet in common parlance it it will paſs well enough for an offence committed, and ſeems to be within the meaning of 31 *Eliz.* 5. § 5. *N.* 2. and in 23 *Eliz.* 1. § 11. *N.* 1. its ſaid the third part of the forfeiture for Recuſancy ſhall be to the poor in the Pariſh where the offence is committed *Infra* 116. *N.* 2.

7. Now if it be objected that if the Recuſancy be not an offence which is to be laid in the proper County by 31 *Eliz.* 5. § 2. *N.* 1. be-

becauſe it is not an offence that can be properly ſaid to be committed, by the ſame reaſon, the Informer who is reſtrained by 31 *Eliz.* 5. § 5. *N.* 1. to a year after the offence committed is not reſtrained in the Caſe of Recuſancy, nor the poor of any Pariſh can take any benefit by 23 *Eliz.* 1. § 11. *N.* 1. as to the third part of the forfeiture, for that there is no Pariſh wherein Recuſancy can be ſaid to be committed, I anſwer there is a great difference betwixt the Caſes, for in the Caſes of limitation of time when the offence muſt be proſecuted 31 *Eliz.* 5. § 5. *N.* 1. and that of the poor of the Pariſh, 23 *Eliz.* 1. § 11. *N.* 1. where the forfeiture is to be diſtributed, the word (committed) is no part of the ſubſtance of the matter, and tis no more than if the Statute had ſaid within a year after the offence and to the Pariſh where the offence was, and there [committed, may be taken well in that ſenſe] but it cannot be ſo in that other Caſe, *ſupra* 62. about the proper County, for 31 *Eliz.* 5. § 2. *N.* 1. makes the Commiſſion of the offence matter of ſubſtance, and whither it were committed or not in the County where it is laid in the Information or popular ſuit, goeth not to the merits of the Cauſe, for if it were not committed in that County and the defendent alledg and traverſe it, and it be found for him, the Plantiff ſhall be barred, and thoſe words, (**That he may traverſe that it was not committed**) ſhew clearly that offences which conſiſt only

by in omission were not intended: for otherwise neither Recusancy nor any other offence of that nature could be punished by any Information or popular Action, for the Jury upon their Oaths must of necessity find that it was not committed in any County, for that in truth and property of Speech it was not committed at all.

8. By 31 *Eliz.* 5. § 5. *N.* 3. If the Informer, *Qui tam*, &c. doth not prosecute within a year after the offence, yet the King may at any time within two years after that year ended, and therefore it was resolved in 2 *Co.* 366, in *Sydedale* and Sir *Edward Lenthall's* Case, where an Information was brought in the Court of Exchequer, *Tam quam* &c. Upon 3 *Jac.* 4. § 3. *N.* 3. for three years forbearance to receive the Sacrament after Conformity, that altho it was not good for the Informer, yet it was well enough as to the King.

Alien. 9. A natural born Subject, or a denizen being defendent in any suit upon a penal Law in *B. R. C. B.* or Exchequer, is not Compellable to put in special Bail, but may appear by Attorny 29 *Eliz.* 5. § 21. *N.* 2. and 31 *Eliz.* 10. § 20. *N.* 3. *Yelverton* 53. Saint *Georges* Case.

Bar. & Feme 10. An Action of debt or Information *Tam pro*, &c. lieth upon 23 *Eliz.* 1. § 11. *N.* 1. against the Husband and Wife for the Recusancy of the Wife, and the Husband in that case is lyable to pay the twenty pound *per* month, notwithstanding he himself be no

no Recuſant 3 *Bulſtrode* 87. The King and *Law*, 1 *Rol.* 93. *pl.* 41. Dr. *Foſters* Caſe, *Hob.* 97. *Moore* and *Huſſey*, *Savile* 25. *pl.* 59. *Infra* 119. *N.* 2.

But the Wife cannot appear by *Superſedeas* alone without her Husband, for both muſt appear or both be outlawed, *Hob.* 179. *Lovedens* Caſe, *Infra* 173. *N.* 2.

Nor can ſhe plead or joyn iſſue without her Husband 2 *Rol.* 90. Sir *G. Curſon* and *Uxor*'s Caſe; and therefore where in an Information brought againſt the Husband and Wife, for the Recuſancy of the Wife, the Record was entred, *& prædict.* J. *&* M. *veniunt*, *&* *prædicta* M. *dicit quod ipſa non eſt inde Culpabilis*, *& de hoc ponit ſe ſuper Patriam*: this was alledged to be ill, for the Husband pleads not at all, but in this Caſe the Docket being *Quod* J. C. *&* M. *uxor ejus*, &c. *placitant non culp.* and it being manifeſt that they both appeared, the record was amended by the Docket, after verdict, for it was but the miſ-priſion of the Clerk in drawing the plea 2 *Cro.* 530. the ſame Caſe with 2 *Rol.* 90. *Crompt.* 14. *a.*

At the end of the Caſe in 2 *Cro.* 530. a note is added that if Sir *J. C.* and his Wife had pleaded *quod ipſi non ſunt culpabiles*, it had been ill, but yet it ſeems that the Law is Contrary to that opinion, for where an Action or Information is brought againſt the Husband and Wife for an offence or wrong done by the Wife, there the Husband is charged *quoad pœnam*, tho not *quoad culpam*;

pam; and when they both plead, *quod ipsi non sunt culpabiles*, the meaning is, that he is not chargeable *quoad pœnam*, and she is not Guilty *quoad culpam*, and therefore it was resolved, addition to *Bendloes* 148 in the Case of *Brown* and *Audley* and his Wife *Trin.* 22 *Jac.* in *Action sur le Case* for scandalous words by the Wife, that where they both plead *non culp.* and the Jury found the Feme guilty, the Plantiff should have Judgment, for the issue was good for the reason aforesaid, and the finding of the Jury was a good ground for the Judgment, for if the Wife were guilty, *quoad culpam*, as the Verdict must necessarily be understood, she being the wrong doer, the Husband by consequence was chargeable, *quoad pœnam*, and Judgment shall be against both.

And the resolution 1 *Cro.* 417. in the Case of *Needler* versus *Symnell* and his Wife, *Mich.* 11. *Car.* 1. is directly contrary to that opinion in the end of 2 *Cro.* 530. for 1 *Cro.* 417. its adjudged that *Ipsi non sunt culpabiles* by Baron and Feme is a good issue, altho the wrong were by the Wife alone.

Alien. 11. An Information of Recusancy lyeth against an Alien, upon 23 *Eliz.* 1. § 11. *N.* 1. If he inhabits within the Realm, and if Judgment be had against him he may have a Writ of Error to relieve himself 1 *Inst.* 129.

Information. 12. When once the Informer *qui tam*, &c. hath commenced his suit he hath of a popular

popular Action made it his own principal Action, 11 *Co.* 65. Dr. *Fosters* Case, *Vaughan* 343. *Thomas* and *Sorrel.*

And in this Case it is not necessary that the defendent be served with Process to answer it, for if the Informer put his Information into Court, tis enough to appropriate to him his share of the penalty, *Godbolt* 158. *pl.* 216.

But yet a Note ought first to be made of the day month and year when it was exhibited, for before by 18 *Eliz.* 5. § 1. *N.* 5. it is not to be taken to be of Record, nor shall operate any thing either in appropriating the penalty, or barring any other Informer, but when that is done no other Informer can sue for the same offence, and tis a good plea in barr, for the defendent to say that there is another Information depending against him for the same offence, for as soon as the first Information is delivered in and entred upon record, according to 18 *Eliz.* 5. § 1. *N.* 5. it shall be said to be depending, altho it be not alledged that any Writ or process is sued out against the defendent thereupon 3 *Cro.* 261. *Mich.* 33. and 34 *Eliz.* the Queen versus *Harris*, *Styles* 417. *Hob.* 209. *Parry* versus *Paris*, *Palmer* 40. *Webbs* Case, *Termes de la Ley verb.* Action popular.

The defendent in an Information pleads that heretofore another Information was exhibited against him such a day in another Court for the same offence, but mistakes and names in his plea a wrong day, and not that wherein

the first Information is exhibited. The Plantiff replyeth, *nul tiel Record*; yet if it appears that in truth the Information pleaded in barr, was exhibited before the other, which is the substance of the matter, this misprision shall not vitiate the defendent *Hob.* 209. *Parry* and *Paris*; note this Case is cited in the late additions to *Dalt. cap.* 191. *Sect* 6. *N.* to prove that one person cannot exhibit two Informations in the same or in several Courts, but that was not the question there, nor I think ever made a question, but that the same person may exhibit too several Informations so they be not both for one and the same offence.

3 *Cro.* 261. The Queen against *Harris*, *Mich.* 33. and 34. *Eliz.* An Information was in *B. R.* upon 5 and 6. *Ed.* 67. § *N.* for buying of Wools, the defendent pleads that there is another Information depending against him in *C. B.* at the suit of *L.* and avers that they are both for the same offence: but in truth that in *C. B.* supposed the offence to be done at one time, and that in *B. R.* at another time, yet this is a good plea in Bar of the latter Information, being with an Averment that they are both for the same offence; for otherwise by the Informers false supposal of the day, the defendent shall be put to double trouble.

And the same advantage no Question any man may take against whom two Informations are exhibited upon 23 *Eliz.* 1. § 4. *N.* 2. for hearing of Mass, for perchance he ne-

never heard Mass above once in his life time, and there is no reason he should be put to double trouble for one offence.

13. But otherwise it seems to be in the Case of Recusancy, for if an Information be on 23 *Eliz.* 1. § 5. *N.* 1. for not coming to Church for a month, there if the defendent proves that he was at Church any time within that month it shall be sufficient to avoid the penalty of the 20 *l.*

And as the defendents giving Evidence that he was at Church within the compass of any other month, then that which is laid in the Information, shall not excuse him; so the Informers proof of his absence any other month shall not hurt him, but the Evidence must go to the very same month which the Information mentions: And the reason is, for that this offence is punishable according to the time of its duration or continuance, and the offendor is to forfeit for every month of his absence, so that if another Information be exhibited against him for not coming to Church during another month, it cannot be supposed to be for the same absence with that in the first Information, but for the like absence at another time, and therefore cannot be pleaded in bar thereof.

14. If two Informers, on one and the same day, exhibit Informations against the same person for the same offence, they are both void and may be pleaded the one in Bar of the other, for that there is no priority to

attach the Right of Action in one of the Informers more than in the other. *Hob.* 128. *Pie* versus *Coke.*

15. Altho *Sunday* be not *dies Juridicus*, so as to award a Judicial process, or enter a Judgment of record on that day, yet an Information may be exhibited in Court on that day, and Good. *Jones* 156. 157, *Bedoe* and *Alpe.*

16. In *C. B.* an Information may by the course of the Court be brought in and delivered to one of the Judges there out of term, and shall be dated then: For 18 *Eliz.* 5. § *N.* forbids all antedates 2 *Rol.* 33. *Smith* versus *Carter.*

17. An Information is brought by an Informer, *Qui tam, &c.* upon 23 *Eliz.* 1. § 5. *N.* 1. for Recusancy; and pending the Information, the Recusant is convicted at the Kings suit upon an Indictment for the same absence; the question is, what remedy the Recusant hath in this Case that he may not *Bis puniri pro uno delicto*? And to this it was answered by *Coke* Chief Justice, *B. R.* in Dr. *Fosters* Case, that he may plead this Conviction, *puis le darreine continuance*, to discharge himself of the Information, 1 *Rol.* 95. *pl.* 41. But, as the Reporter well observes there, the Informer when he hath begun his popular Action hath appropriated the Action to himself: And if it shall be admitted that the King can devest him of this Action when he pleaseth, by Indictment at his own suit, this would prove very

very miſchievous to Informers. *Quere* therefore, how in this Caſe the Recuſant ſhall defend himſelf from being doubly puniſht for one and the ſame offence.

But if the Recuſant be once convicted at the Kings ſuit either by Indictment upon 23 *Eliz.* 1. § 5. *N.* 1. or according to 29 *Eliz.* 6. § 2. *N.* 5. or 3 *Jac.* 4. § *N.* upon Proclamation, the Informer, *Qui tam, &c.* Cannot afterwards charge him, but is barred for ever after: For the intention of 23 *Eliz.* 1. § 11. *N.* 1. is, that the Informer may exhibit Informations againſt ſuch only as are concealed, or not charged at the Kings ſuit: So that the Informer is *neque falcator, neque meſſor*, but *ſpicelegus*, a Gleaner. And that in ſuch Caſes only where the King doth not proſecute pardon or releaſe before the Informers Action is commenced. 11 *Co.* 65. Dr. *Foſters* Caſe, *Bridgman* 121. 122. *Parker* againſt Sir *J. Webb* and *uxor.* *Lane* 60.

But whither this rule be general, and will not admit of an Exception in the Caſe of a Feme Covert, is a Queſtion: For by ſome opinions, if a Feme Covert be Indicted and convicted of Recuſancy, that ſhall not barr the Informer of his popular Action upon 23 *Eliz.* 1. § 11. *N.* 1. againſt her and her Husband for the Recuſancy of the Wife: becauſe upon the Conviction by Indictment, the cannot be compelled to pay the forfeiture of twenty pound *per* month while her Husband lives, nor can it be le- *Bar. & Feme*

vied of her Goods and Lands: for that during the Coverture, she hath nothing of her own to forfeit, but all is her Husbands. *Bridgman* 122. *Infra* 270. *N* 9.

The Condemnation or acquittal of the party at the suit of the Informer, is a good Bar against the King and all others, 11 *Co.* 66.

Collusion. 18. Before 4 *H.* 7. 20. § 1. *N.* 7. It seems that if a popular Action had been brought by Covin, and with the consent of the defendent, and the defendent was for want of Evidence or other Cause found not guilty, and the Covin appeared to the Court, yet Judgment should have been given thereupon against the King, and it should have been a good Bar against all others, 9 *Ed.* 4. 4. *pl.* but now by 4 *H.* 7. 20. § 1, *N.* 7. If any person sue with good Faith any Action popular, and the defendent Plead a Recovery in an Action popular in Bar, or that before that time he had Barred the Plantiff in such Action, the Plantiff may aver such recovery or Bar was by Covin, and upon such Covin found, the Plantiff shall have Judgment; and the defendent attainted or condemned of Covin, shall shave Imprisonment of two years by process of *Capias* or Outlawry, as well at the Kings suit as any other, and the release of the party shall not avail the defendent; which Covin may be averred generally. *Com.* 49. 50, 54, 55. *Wymbishe* and *Talbois.*

If a man bring upon a penal Statute debt

tam

tam, &c. quam, &c. and the defendent pleads, thereunto the Plantiff may reply without the Kings Attorny *&c. Princes* Case.

In debt upon 23 *Eliz.* 1. § 11. *N.* 1. the defendents demurred, and the Plantiff *qui tam, &c.* Joyned in demurrer without the Kings Attorny, and held to be good, 1 *Cro.* 10. 11. *Farringtons* Case, *Trin.* 1 *Car.* 1. but in an Information *tam, &c. quam, &c.* the Kings Attorny ought to reply, 2 *Rol.* 33. *Smith* and *Carter.*

And this difference between debt and an Information was taken *Hutton* 82. in the said *Farringtons* Case; but yet if in an Information the defendent plead a special plea, and the Kings Attorny will not reply, and prosecute for the Kings part, the Informer shall be admitted to reply and prosecute for his part, as was adjudged in *Stretton* and *Taylors* Case, 1 *Leonard* 119. *pl.* 161. and 11 *Co.* 65. Dr. *Fosters* Case, 3 *Inst.* 194.

19. The King before any Information or other popular suit commenced may pardon or release the whole penalty incurred, and it shall be a good bar against all men 11 *Co.* 65. 66. Dr. *Fosters* Case, 3 *Inst.* 194. 195. 37 *H.* 6. 4. 2 *R.* 312. 1 *H.* 7. 3. *Termes de ley* 102. *Decies tantum.* *Priory.*

And if the defendent in the Information do not take advantage of such pardon or release by his plea, but is condemned in the suit and the Kings share of the penalty be

put in the Pipe *in magno rotulo*, yet he may then discharge himself thereof upon a *Compertum fuit in magno rotulo*, by shewing forth the whole matter by way of Plea, and shall not loose the effect of his pardon or release. *Savile* 23. *pl.* 56. *Tirringhams* Case.

But when once the Informer hath brought his popular Suit, the King cannot discharge it, and if he then pardon or release, or his Attorny enter an *ulterius non vult prosequi*, this is good for the Kings part only but is no Bar *quoad* the Informer who may proceed notwithstanding for his part of the penalty: And therefore neither can the Kings Attorny discharge the Jury when they come to deliver their Verdict. *Hutton* 82. *Vaughan* 343. *Thomas* and *Sorrel.* 1 *Leonard* 119. *pl.* 161. and 3 *Cro.* 138. *Stretton* and *Taylor*, 3 *Cro.* 583. *Hammon* and *Griffith*, 3 *Inst.* 194. 1 *H.* 7. 3.

Such Entry of a *non vult prosequi* by the Attorny General, hath the same effect with a Nonsuit of a Private person; but the King cannot be said properly to be Nonsuit, because he is in Judgment of Law ever present in Court 1 *Inst.* 139. 227. *Hutton* 82. *Goldsborough* 53. *pl.* *Leighs* Case *Savile* 56. *pl.* 119. *Weare* against *Adamson.*

Upon the Death of Queen *Elizabeth* it was resolved by the Judges, that where an Information *tam pro Domina Regina*, *quam &c.* was brought upon a penal Statute and pending the same and before Judgment the Queen dyed, the Information it self should

stand

ſtand, for that otherwiſe the Suit might be loſt, there being a time limited for the bringing of it, but all the proceedings thereupon were loſt and void, and the defendent ſhould plead *de novo*, 2 *Cro.* 14. and 7 *Co.* 30. 31. *Of diſcontinuance of Proceſs.* And to that purpoſe 5 *Ed.* 6. *Rot.* 38. is there cited, where in a popular action, the King dyed after demurrer upon the Evidence, and before Judgment, and the defendent pleaded *de novo.*

But yet 1 *Cro.* 10. 11. and *Hob.* 82. *Farringtons* Caſe, in a popular action of debt upon 23 *Eliz.* 1. § 11. *N.* 1. againſt *Prince* and his Wife, where the defendent demurred upon the declaration, and the Plantiff, *qui tam*, *&c.* Joyned demurrer in *Hillary* Term, and King *James* died the Vacation following. It was reſolved that not only the Writ and declaration, but all the other proceedings thereupon ſhould ſtand notwithſtanding the demiſe of the King, for that in ſuch Caſe it is meerly the Suit of the party, and is aided by 1 *Ed.* 6. 7. § 1. *N.* 4. of Diſcontinuances, and he only Joyned in demurrer.

Which Reſolutions are in appearance flatly contrary each to other, for 2 *Cro.* 14. ſeems to take in all popular Suits whatſoever and as well a popular Action of debt as an Information, but yet tis obſervable that in 1 *Cro.* 10. the Plantiff only joyned in demurrer, and not the Kings Attorny: And this ſeems to be the reaſon, why in that Caſe the proceed-

proceedings ſhould ſtand notwithſtanding the demiſe of the King, for where the party alone joyns in demurrer, or replies, and not the Kings Attorny, there the Suit may properly be ſaid to be depending between party and party, and within the expreſs words of 1 *Ed.* 6.7. § 1. *N.* 4. which provides, that altho the King die, all proceedings in Suits depending between party and party ſhall ſtand: But 2 *Cro.* 14. is to be underſtood of ſuch Caſes where after a Plea or demurrer by the defendent, the Attorny General alone replies, or joynes in demurrer, there the proceedings ſhall be void and the defendent ſhall plead *de novo*. But the Information it ſelf ſhall ſtand to avoid a manifeſt inconvenience, for that the Informer is limited to a certain time wherein to exhibit his Information, and ſo theſe two opinions are reconciled.

Releaſe. 20. An Informer, *qui tam, &c.* may be Nonſuited altho the King cannot, 1 *Inſt.* 139. *Hutton* 82. *Farrington* verſus *Arundell*.

If pending the popular action, or Information the Plantiff or Informer, *qui tam, &c.* be Nonſuited, or releaſe, or *Enter a nolle proſequi*, or die, none of theſe ſhall bar the King, but the Attorny Genaral may proceed upon the Information for the Kings part, 1 *Leonard* 119. *pl.* 191. 3 *Cro.* 138. *Stretton* verſus *Taylor*, 3 *Cro.* 583. *Hamond* 3 *Inſt.* 194. *Moor* 541. *pl.* 715. and 11 *Co.* 66. Dr. *Foſters* Caſe, 2 *Bulſtrode* 261. 262. *Waller* verſus *Hanger*, 2 *Rol.* 33. *Smith* verſus

ſus *Carter*: And therefore the opinions in 37 *H.* 6. 5. and 38 *H.* 6. 2. that if the Plantiff in a *Decies tantum* which is a popular Action, be Nonſuit, the King is without remedy but by Indictment: or if ſuch Plantiff will relinquiſh his Suit that the King hath nothing further to do, ſeem not to be Law at this day.

21. If a popular Information be brought upon a penal Statue in a wrong Court where the Informer cannot ſue, yet it was held, *Moor* 564, *&c. pl.* 770. in *Agar* and *Candiſhes* Caſe that the King ſhould not for that looſe his advantage of the ſuit, but the Information ſhould be good for his part of the penalty. *Courts.*

By 18 *Eliz.* 5. § 3. *N.* 3. If an Informer or Plantiff, upon a penal Statute where any forfeiture is generally limited to him that will ſue, ſhall delay or diſcontinue his ſuit, or be Nonſuit, or ſhall have the Tryal or matter paſs againſt him, by Verdict or Judgment of Law, he ſhall pay to the defendent his Coſt Charges and Damages: ſee the addition to *Bendloes* 141. *Rhobotham* and *Vincent*; and if it be upon a ſpecial Verdict or demurrer, thoſe Caſes are within 18 *Eliz.* 5. § 3. *N.* 3. and he ſhall pay Coſts, by force thereof *Hutton* 36. *Pies* Caſe. *Coſts.*

But an Informer is not compellable to find Sureties to anſwer Coſts, howbeit the Court if they ſee Cauſe may order him to appear in perſon before the defendent anſwer the Information 2 *Bulſt.* 18 *Martin* and *Gunnyſtons* Caſe.

Savil 10. *pl.* 26. *Wilkes* Caſe, it was held

held in the Exchequer Chamber that if a writ of Error be brought upon a Judgment given for the King at the Suit of an Informer, a *Scire facias* ought to be awarded against the Informer.

LXXX. *Courts.*

Page 82, 83, 84. By **any Court of Record**, is here 23 *Eliz.* 1. § 11. *N.* 1. meant the four ordinary Courts of Record, at *Weſtminſter*: For they are the general Courts of Record, and the Courts where the Kings Attorny may acknowledge or deny, and the words of 23 *Eliz.* 1. § 11. *N.* 1. being general are left to the conſtruction of law, where the Rule is that *verba equivoca & in dubio poſita intelliguntur in digniori & potentiori ſenſu.* And in this ſenſe ſhall theſe words (Court of Record) be conſtrued in all penal Statutes where the penalty is to be recovered in a popular ſuit, ſo that the Informer, *qui tam*, *&c.* cannot ſue before Juſtices of Aſſize Goal-delivery or *Oyer* and *Terminer*, or Juſtices of Peace as in Borrough or corporate Towns, or in a Court of Pipowders, Stannary Courts, *&c.* *Jones* 193.

And ſuch a conſtruction hath been made of thoſe words (Court of Record) upon ſeveral Statutes as 6 *Co.* 19. 20. and *Moor* 600. *pl.* 827. *Gregories* Caſe on 4 and 5 *Ph. & Mar.* 5. § *N.* of *Woolen Cloathes.*

In 1 *Cro.* 149. *Green* verſus *Guy*, on 21 *H.* 8. 13. § 11. *N.* 2. of Non-reſidence.

In 1 *Cro.* 112. 113. and *Hutton* 99 *Farrington* and *Keymer*, on 23 *H.* 8. 4. § 5. *N.* 3. of Brewers.

In

In *Stiles* 340. *Buckſtone* and *Shurlock* on 7 *Ed.* 6. 5. § 6. *N.* 3. of ſelling wine without Licence.

In 3 *Cro.* 737. *Barnabee* verſus *Goodale.* and 2 *Cro.* 538. *Millors* Caſe and *Styles*, 383. upon 5 *Eliz.* 4. § 13. *N.* 3. of Trades.

In *Moor* 421. *pl.* 581 upon the Statutes for Tanning of Leather and divers others.

2. It was held *Mich.* 6 and 7 *Ed.* 6. *Dyer* 236. *pl.* by all the Juſtices but three, that where a Statute appoints a penalty for any offence made thereby, which was not an offence at the common law to be Recovered in any of the Queens Courts of record by Action of debt and no other Court is appointed: The Statute intends the four ordinary Courts of Record at *Weſtminſter*, and the offence and penalty cannot be puniſhed and determined by Commiſſioners of *Oyer* and *Terminer in Patriam.*

But *Dyer* makes a *Quære* hereupon; and Sir *Edward Coke* in *Scarlets* Caſe, 12 *Co.* 98. ſaith 10 *Jac.* that the opinion of *Catlin*, *Sanders*, and *Whiddon*, (which were the three diſſenting Juſtices before, *&c.*) is at this day held for good law, and the opinion of the reſt of the Juſtices that (any Courts of Record) are reſtrained to the ordinary Courts at *Weſtminſter* of Record, is not held for law. Continual Experience (ſaith he) being againſt it, for that Juſtices of Aſſize in reſpect of their Commiſſion of *Oyer* and *Terminer*, have alwaies enquired of offences where the penalties is appointed

to

to be sued (in any Court of Record) as upon 33 *H.* 8. 9. § 18. *N.* 1. of unlawful Games 35 *H.* 8. 17. § 9. *N.* 2. of words and 5 and 6 *Ed.* 6. 14. § 9. *N.* 2. of forfeitures and other Statutes.

But under favor, altho Commissioners of *Oyer* and *Terminer* may take Indictments for the doing of that which is made *malum prohibitum* by a Statute Law, yet that part of the opinion in *Dyer* 236 which relates to the Action of debt and the Courts of Record where such Action must be brought, is good law, and where only (Courts of Record) are named, such Action cannot be brought in any other Court then the four ordinary Courts of record at *Westminster*, as appears by the several Cases and resolutions before recited.

3. Sir *Edward Coke* 3 *Inst.* 193. and 4 *Inst.* 174. saith that this exception of Recusancy, in 21 *Jac.* 4. § 5. *N.* 1. doth not extend to the Courts 21 *Jac.* 4. § 1. *N.* 5. wherein the Informer is to sue but only to the County where 21 *Jac.* 4. § 2. *N.* 1. the offence is to be laid.

So that notwithstanding that exception 21 *Jac.* 4. § 5. *N.* 1. the Kings Bench Chancery, *C. B.* Exchequer, or Exchequer Chamber, cannot relieve or hold plea of any Information for Recusancy, either by the Kings Attorny or any Common Informer, but the matter shall be heard and determined before Justices of Assize *Nisi prius*, Goal-delivery or *Oyer* and *Terminer*, or Justices

ces of Peace in their general Seſſions, according to 21 *Jac.* 4. § 1. *N.* 3. but the Informer if it be for Recuſancy may by force of that exception 21 *Jac.* 4. § 5. *N.* 1. lay or alledge ſuch offence in what County he will, for the ſaid exception extends only to the County 21 *Jac.* 4. § 2. *N.* 1. and not to the Courts 21 *Jac.* 4. § 1. *N.* 5. where the Informer is to ſue.

Which opinion of his touching the extenſiveneſs of the exception is probable enough, (*viz.*) that 21 *Jac.* 4. § 5. *N.* 1. extends only to the County and not to the Courts where the Informer is to ſue, for the latter part of it ſpeaks only of the County, but this is unaptly applied to popular Informations upon 23 *Eliz.* 1. § 11. *N.* 1. for they are not within the meaning of that branch of 21 *Jac.* 4. § 1. *N.* 5. touching the Courts where the Informer is to ſue; for 21 *Jac.* 4. § 1. *N.* 5. medles not with thoſe Informations upon thoſe penal Laws which give the Informer no other remedy for recovery of the penalty but by Debt, Bill, plaint or Information in the Courts of Record at *Weſtminſter*.

Nor doth 21 *Jac.* 4. § 1. *N.* 3. give the Juſtices of Aſſize, or other Juſtices there named any new or further power than they had before, but only appoints that where Informations might have been brought before them or in the Courts of *Weſtminſter* at the Election of the Informer, now they ſhall be brought before Juſtices of Aſſize,

Niſi

Nisi prius, Goal-delivery or *Oyer* and *Terminer*, or at the Sessions of the Peace in the County where the offence was committed, for the ease of the Subjects who are defendents and not in the Courts at *Westminster*. 4 *Co.* 1. 1 *Cro.* 112. 113.

But in our Case of Recusancy, there is no such Election given the Informer by 23 *Eliz.* 1. § 11. *N.* 1. but he is strictly tyed to take his remedy by debt, Bill, plaint or Information in one of the Courts at *Westminster*, and therefore 21 *Jac.* 4 § 1. *N.* 5. extends not to it in that branch touching the Courts where the Informer is to sue.

And as for Sir *Edward Cokes* Opinion, that since 21 *Jac.* 4. § 1. *N.* 5. the Courts at *Westminster* cannot receive or hold Plea of any Information brought by a Common Informer, not only common Experience ever since that Statute is against it, but the Judgments and resolutions both of *B. R. Mich.* 4. *Car.* 1. *Greene* and *Guy*, 1 *Cro.* 146. *pl.* upon 21 *H.* 8. 13. § 11. *N.* 2. and *Fentons* Case, *Mich.* 27. *Car.* 2. upon this Statute of 23 *Eliz.* 1. and of *C. B.* in *Farrington* and *Leymer* 1 *Cro.* 112. *Hutton* 99. *Trin.* 4 *Car.* 1. upon 23 *H.* 8. 4. § 5. *N.* 3. Are directly in point Contrary thereunto, and so is the opinion of *Rolls* in *Styles* 340. *Buckstone* and *Shurlock*, 7 *Ed.* 6. 5. § 6. *N.* 3. and the resolution in *Jones* 193.

And yet altho in penal Statutes (any Court of Record) shall be restrained to the ordinary

ordinary Courts of Record at *Westminster*, possibly in other Statutes those words may admit of a larger Construction 1 *Rol.* 51. *pl.* 21. *Floyd* and *Best.*

Page 85, 86. Upon 23 *Eliz.* 1. § 11. *N.* 1. by Action of debt, Bill, plaint or Information, by 18 *Eliz.* 5. § 1. *N.* 3. it is enacted that none shall be admitted or received to prosecute against any person upon any penal Statute but by way of Information or original Action and not otherwise, 6 *Co.* 19. 20. *Moor* 412. *pl.* 565. and 600. *pl.* 827. *Gregories* Case 3 *Cro.* 544. *Gadley* versus *Whitecote.* LXXXI. *Information.*

And this seems to extend as well to penal Statutes made afterwards as to those that were in force when 18 *Eliz.* 5. § 1. *N.* 3. was made, for tis usual for a latter act of Parliament to be guided by a former, as 4 *Co.* 4. *Vernons* Case.

But then it must be in such Cases where there are not express words in the latter act to controule the former, and therefore altho the word of 18 *Eliz.* 5. § 1. *N.* 3 that the Informer shall not prosecute otherwise then by Information or original action, yet the Affirmative words of this subsequent Statute 23 *Eliz.* 1. § 11. *N.* 1. that the Informer may sue by Bill hath taken away the force of that negative in 18 *Eliz.* 5. § 1. *N.* 3. in relation to the offence mentioned in 23 *Eliz.* 1. and the prosecutor, *qui tam, &c.* upon 23 *Eliz.* 1. § 11. *N.* 1. may sue by Bill in *B. R.* as well as

by Information which otherwiſe had there been no direct words here to that purpoſe he could not do as it ſeems by the reſolution 3 *Inſt.* 194. in *Woodſon* and *Clerks* Caſe.

In a ſuit brought by Bill in *B. R.* upon 23 *H.* 6. 10 § 1. *N.* 12. of Sheriffs, and in *Moor* 248. *pl.* 390. *Udeſon* and the Major of *Nottinghams* Caſe, contrary to the opinion in *Styles* 381. *Hill* and *Dechair.*

LXXXII. *Impriſonment*

Page 86. Upon 23 *Eliz.* 1. § 11. *N.* 2. *Qui non habet in ære, luet in corpore.* And yet in this Caſe the Judgment ſhall be abſolute that the King and the Informer recover, *&c.* 1 *Anderſon* 140. *pl.* 190. *Vachels* Caſe.

2. A Feme Covert Recuſant if the forfeiture be not paid within the time limited, 23 *Eliz.* 1. § 11. *N.* 2. may be impriſoned by force of this Statute until ſhe pay or conform 11 *Co.* 61. Dr. *Foſters* Caſe, *Hob.* 97. *Moor* and *Huſſey.*

And if ſhe be convicted upon Indictment at the Kings ſuit, in which Caſe the Huſband is not bound to pay the penalty, ſhe ought by the opinion of *Manwood* to have hard and cloſe Impriſonment, and ſequeſtred from all Company, until ſhe conform or forfeiture be paid, *Savile* 25. *pl.* 59.

But if the Husband and Wife be ſued upon 23 *Eliz.* 1. § 11. *N.* 2. in a popular Action or Information for the Recuſancy of the Wife, and Judgment be had againſt them, and the forfeiture is not paid within the three months, the Husband in that Caſe may

may be Imprisoned likewise.

1. Page 87. Upon 23 *Eliz.* 1. § 13. *N.* 1. since the beginning of this Session of Parliament, and yet a Covenons Conveyance tho made before that Session of Parliament should not have defeated the Interest, right or Title which was given to the Queen by this Statute, and therefore in the Case of Sir *John Southwell* 3 *Leonard* 147. 148. *pl.* who in *Anno* 19 *Eliz.* Conveyed his lands to certain Feoffees and their heirs in trust for the maintenance of him and his Family, Marriage of his Daughters, payment of his debts, *&c.* and to answer him the surplusage of the mean profits, with a Clause of revocation after which he granted Trees took Fines for leases, *&c.* And then came 23 *Eliz.* 1. § 13. *N.* 1. upon which he was Indicted and convicted: It was resolved by all the Judges of *England* that the said lands were liable to this Statute, and the Jurors charged to enquire what lands he had, and were committed to the Fleet, and fined each of them fifty pounds, for that yet they would not find those Lands to be his. LXXXIII. *Assurances.*

2. By means of any Conviction or Judgment 23 *Eliz.* 1. § 13. *N.* 1. *Paunce foot* being Indicted of Recusancy made a deed of gift of all his leases and goods, to a great Value, coloured over with feined considerations to defeat the Queen of what might accrew to her by his Recusancy or flight, and then went beyond Sea, and afterwards was outlawed upon the said Indictment and *Collusion.*

it was resolved 36 *Eliz.* by the whole Court of Exchequer that this was a fraudulent Conveyanc within 13 *Eliz.* 5. § 2. *N.* 3. which was made for the relief of the Queen and otherpersons, as well as Creditors.

But as this Case is related in 3 *Co.* 82. *Twines* Case, tis observable that altho it was debated whither the Queen should avoid this Conveiance by force of 50 *Ed.* 3. 6. § 1. *N.* 2. or that of 3 *H.* 7. 4. § 1. *N.* 2. or that of 13 *Eliz.* 5. § 2. *N.* 3. yet there is no mention made of this branch of 23 *Eliz.* 1. § 13. *N.* 1. for tis clear that the Queen could not avoid such a fraudulent Conveyance by force of 23 *Eliz.* 1. § 13. *N.* 1. unless Judgment had been first given against the Recusant or he had been convicted, and *Pauncefoot* was neither Convicted or adjudged to be a Recusant, but the Queens interest accrewed to her by means of the outlawry only.

LXXXIV. *Priviledge.* Page 88. Upon 23 *Eliz.* 1. § 14. *N.* 1. altho a Peer shall be tryed *per pares*, yet he is to be indicted by an inquest under the degree of Nobility, and may be Indicted before Commissioners of *Oyer* and *Terminer*: or in *B. R.* if the offence be Committed in the County where the Kings bench is, 2 *Co.* 49.

27 Eliz.

27 Eliz. 2.

Of JESUITS.

Page 90. And his **Being born within this Realm**, &c. 27 *Eliz. Alien.* 2. § 3. *N.* 1. must be compriſed in the Indictment, but it need not be ſhown in what particular place he was born, but generally, *Quod* J. S. *natus infra hoc regnum Angliæ*, &c. LXXXV.

And ſo it muſt be alledged in the Indictment on 27 *Eliz.* 2. § 3. *N.* 1. that he was made a Jeſuit or Prieſt, &c. by authority Challenged or pretended from the See of *Rome.*

But it needed not be ſhewed where he was made a Jeſuit or Prieſt, &c. whither beyond the Sea or within the Realm, for whereſoever it was, it is within this Law, if he were made ſo by the pretended Authority of the See of *Rome. Popham* 94. *Southwells* Caſe.

Page 91. In the late additions to *Dalt. Cap.* 140. § 13. *tit.* high Treaſon: 'Tis ſaid that 27 *Eliz.* 2. § 4. *N.* 1. relates only to ſuch as had before that time taken Orders; which conceit I ſuppoſe, is grounded on theſe words (*viz.*) who at the end of the ſaid LXXXVI *Seminary.*

forty days, and after such time of departure as aforesaid shall receive &c.) as if no Jesuit or Priest were here intended, but such a one as was then a Priest, or Jesuit, and had fourty days given him for his departure; and no person a Felon by 27 *Eliz.* 2. § 4. *N.* 1. who receives or releives any other.

2. But the words here (such Iesuit &c.) seem to be more Extensive, and to relate as well to the Receivers, or Releivers of a Jesuit or Priest in Orders at this day, as to those who were in Orders at the time of making this Statute; and if we weigh the Gramatical Construction of the words, with much more reason the former than the latter.

For the *Proximum Antecedens* to (such) is the Jesuit, or Priest, 27 *Eliz.* 2. § 2. *N.* 1. who was to be made, ordained, or professed, and not he that was then ordayned, or professed already.

And those words in 27 *Eliz.* 2. § 4. *N.* 1. Every Parson which after the end of the same *XL.* dayes &c. shall receive &c. that is fourty days next after the end of that Session of Parliament, may well be construed to Extend to all Cases, as well of receiving, or relieving such who should be afterwards in Orders, and should be found within the Realm for the time to come, at any time after those fourty days, as of such who were then in Orders, and were to depart before the *XL.* days were expired.

3. So

3. So that the receiving, releiving, or maintaining of a Jesuit, Popish Priest, or other Popish Ecclesiastical person at liberty, and known by the party to be such, is Felony at this day by this Act 27 *Eliz.* 2. § 4. *N.* 1. and the Offender shall lose the benefit of his Clergy: and so hath the Law been taken upon Actions upon the Case for saying the Plaintiff kept a *Seminary*-Priest, or Jesuit in his house, knowing him to be such, 2 *Cro.* 300. *Pasch.* 10 *Jac. Smith* versus *Flynt* and *Palmer* 410. *Clerk* and *Logins* Case, *Lamb.* 225. *Infra* 275.

Page 92. By this word **Return** 27 *Eliz.* 2. § 5. *N.* 1. It seems that none are intended here, but such as were sent out of this Realm; for others born and resident in some other parts of the Kings Dominions, untill their Entry into such Colledg, or Seminary, cannot be properly said to return hither.

LXXVII. *Ouster le Mr*

Page 92, 93. Or any other her Highness Dominions 27 *Eliz.* 2. § 5. *N.* 1. a Subject of the Kings sent out of *England* to a Popish Colledg or Seminary, is Commanded by Proclamation made in *London*, to return into this Realm, and within the six months here limited, first goeth into *Ireland*, and then comes into *England*, and within two days submits himself, and takes the Oath of Supremacy; in this Case, notwithstanding his return into *England* within the six months, he shall be guilty of High

Treason; for after such Proclamation he ought to have come directly into *England*, and into no other of the late Queens Dominions before he had been in *England*; and if he doth, he comes into the said Dominions otherwise then is appointed by this Act, 27 *Eliz.* 2, § 5. *N.* 1.

For the intent of 27 *Eliz.* 2. § 5. *N.* 1. Seems to be that he should not remain in any of the said Dominions, untill he submits and takes the Oath; which submission must be made by Oath taken in *England*, within two days after his Arrival here, and not elsewhere: and altho the Oath of Supremacy be in force in *Ireland*; yet his taking it here will not serve, nor yet his submission there; for he is to submit to the King and his Laws, by which are intended the Laws of *England* and no other: But a submission in *Ireland* to the Kings Laws can be taken to be of such Laws only as are in force in *Irealnd*.

And in this Case the Offender may be tryed here in *England*, altho his offence was committed in *Ireland*, and that by force of 35. *H* 8 2. § 1. *N.* 2. notwithstanding the Statute of 1. and 2. *Ph.* and *Mar.* 10. § *N.* For it was resolved 1. *Anderson* 263. *pl.* 269. in *Ororkes* Case by all the Judges of *England* 33. *Eliz.* that Treason committed in *Ireland* may be tried in *England*; and the like resolution was in Sr. *John Perrots* Case: 34. *Eliz.* 7 *Co.* 23. *Calvins* Case 1. *Inst.* 261. 3. *Inst.* 11. *Dyer* 298.

298. Dr. *Stories* Case 13. *Eliz.*

And if a Subject of *England* who is a Peer of *Ireland* be sent to any such Colledg, or Seminary and offend; as 27. *Eliz.* 2. § 5. *N.* 1. aforesaid, he may be tryed in *England* by a common Jury, notwithstanding the offence was in *Ireland* where he is a Peer, contrary to 19 and 20 *Eliz.* *Dyer* 360. Where it is said that *Wray*, *Dyer*, and *Gerard* Attorny general were of opinion that a Peer in *Ireland* cannot be tryed in *England* for Treason done in *Ireland*; because he cannot have his trial by his Peers: But this is not Law; and Sr. *Christopher Wray* protested he never gave any such opinion, but held the contrary. 1. *Inst.* 261.

Page 93. Upon 27 *Eliz.* 2. § 6. *N.* 1. [Convey, Deliver. &c.] So that he that is barely a Messenger, or Instrument to convey, or deliver such mony, or other releif, is within the Danger of this Law, as well as the Lender or Giver. LXXXIX. *Accessary*

Page 93. 94. This Clause 27 *Eliz.* 2. § 6. *N.* 4. Extends not to every person brought up in such Colledge or Seminary; as *Wingate Crown*, 54. mistakes: For if such person afterwards quits his Colledg or Seminary, and hath no longer any relation thereunto, but abides elsewhere beyond the Seas; he who gives or conveys releif, or maintenance to him, is not within this branch of the Statute; because the person releived, or maintained is not then of or XC.

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in any Colledg or Seminary, and yet perhaps this may be an offence within 3 *Car.* 1. 2. § 1. *N.* 2.

Page 97. Upon 27 *Eliz.* 2. § 10 *N.* 1. The taking of the Oath by such Jesuit, Priest or other Ecclesiastical person, and his Acknowledgment of his due obedience, doth not exempt him from the danger of this Law, as *Wingate Crown.* 57. mistakes: But he must continue his due obedience to the Laws made in Cases of Religion: and this seems to be clearly the meaning of the Makers of this Law. 27 *Eliz.* 2. § 10. *N.* 1. So that if afterwards he shew his disobedience to any of these Laws, by forbearing to come to Church &c. he may be Indicted as a Traytor, for coming into the Realm, as if he had never made any such submission and acknowledgment.

XCII. *Prerogatives.*

Page 95. **Her Highness Laws.** 27 *Eliz.* 2. § 10. *N.* 1. That is the Laws of her and her Successors; and not only those which were made in her own time, But such likewise as should be made afterwards: For in Acts of Parliament King or Queen, if a Soveraign, Includes Successors; unless there be express words of restraint to that individual person. *Com.* 176. *Hill* and *Grange* 6 *Co.* 27. the Souldiers Case 12 *Co.* 109. 1 *Inst.* 9. and 2. *Inst.* 742. and 3. *Inst.* 6. 4. *Inst.* 352.

And so it is of the Kings Grants, if in his politick Capacity; for there his Successor shall be charged tho the Grant men-

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tion neither Heir or Succeſſor; as it was adjudged in the Caſe of an Annuity granted to Sir *Thomas Wroth* during his Life. *Com.* 457.

Page 97. Being Subject of this Realm 27 *Eliz.* 2. § 13. *N.* 1. And not any perſon as *Wingate Crown* 59. miſtakes. XCIII.

Page 97. At the Queens pleaſure 27. *Eliz.* 2. § 13. *N.* 1. In this Caſe the Offender muſt be proceeded againſt according to the courſe of Law: For he cannot be Fined or Impriſoned at the Kings pleaſure by force of this Statute, before he be Indicted, Convicted, and Judgment given againſt him: and ſo were the Proceedings againſt Sir *Thomas Figet* (*Tit. Contempts Br.* 6. do not ſay he was firſt Arraigned *&c.*) for going Armed contrary to 2 *Ed.* 3, § *N.* for 24. *Ed.* 3. 33. ſaith that he was Arraigned. XCIIII. *Prerogatives.*

And if in this Caſe on 27 *Eliz.* § 13. *N.* 1. the Offender be committed to Priſon, in order to his Trial and Conviction; yet before Judgment, or at leaſt before Conviction he may be let to mainprize, and the Fine ſhall be Impoſed by the Juſtices before whom he is Convicted: *Juſticiarii per eorum Deſcretionem aſſeſſent finem et non Dominus Rex per ſe in Camera ſua, nec aliter Coram ſe niſi, per Juſticiarios ſuos et hæc eſt voluntas Regis* (viz.) *per Juſticiarios ſuos et legem ſuam unum eſt dicere* 2 *R.* 3. 11. ſee 4. *Inſt.* 71. 179.

29. Eliz.

29 Eliz. 6.

Of PROCLAMATIONS.

XCV. *Courts.*

PAge 100, 101. Sir *Edward Coke* in Dr. *Foster's* Case 11 *Coke* 61. saith that by this Clause 29 *Eliz.* 6. § 2. *N.* 2. (as hath been well observed) 23 *Eliz.* 1. § 11. *N.* 1. is altered in a material point, *viz.* that whereas by 23 *Eliz.* 1. § 11. *N.* 1. The Informer might sue the Recusant; for the penalty in any Court of Record, he is now by 29 *Eliz.* 6. § 2. *N.* 2. restrained from suing in the *C. B.* or Exchequer: But this is utterly denyed to be Law, as the constant practice and experience ever since 29 *Eliz.* 6. § 2. *N.* 2. sufficiently testifies: and *Hob. Ch. J.* 204. in *Pie* and *Lovel's* Case saith, that that Observation was made as he takes it by Sir *Edward Coke* himself; But however Serjant *Rol.* in Dr. *Fosters* Case 1 *Rol.* 93. *pl.* 41. brings him in speaking in another Language, and more consonant to Law, *viz.* That the Conviction here mentioned 29 *Eliz.* 6. § 2. *N.* 2. is intended of Convictions upon Indictments only; and that no other sort of Convictions or Proceedings upon 23 *Eliz.* 1. are mentioned or intended throughout this whole Act 29 *Eliz.* 6. And

And if ſo, then the Informer is not concerned in this Act, 29 *Eliz.* 6. § 2. *N.* 2. nor reſtrained thereby, as to the Courts wherein he is to ſue but that he may ſue ſtill in *C. B.* or Exchequer, and ſo was it reſolved in point in *Hob.* 204. 205. *Pie* and *Lovels* Caſe, where the opinion of Sir *Edward Coke* 1 *Rol.* 93. is confirmed and allowed for Law, and 11 *Co.* 61. exploded, 29 *Eliz.* 6. § 2. *N.* 2. being made only for the benefit of the Queen in her ſuits by Indictment, *Infra*, 118 165.

Juſtices.

2. And the true reaſon is there given *Hob.* 204. 205. why thoſe negative words *and not elſewhere*, were added 29 *Eliz.* 6. § 2. *N.* 2. *viz.* not to exclude the Informer out of the *C. B.* or Exchequer, but to reſtrain Juſtices of Peace from proceeding to Convict any perſon upon Indictments for Recuſancy or for ſaying hearing or being at Maſs, which they were enabled to do by 23 *Eliz.* 1. § 8. *N.* 1. but again diſabled by theſe negative words in this Act 29 *Eliz.* 6. § 2. *N.* 2. and the hearing and determining of thoſe offences commited only to the Juſtices of *B. R.* Aſſizes and general Goal-delivery.

But for Informations by a common Informer, they were never intended here 29 *Eliz.* 6. § 2. *N.* 2. and the Juſtices of Aſſize and Goal delivery cannot hold plea of ſuch Information, as was reſolved by the Judges *Mich.* 4. *Car.* 1. *Jones* 193.

And yet 29 *Eliz.* 6. § 2. *N.* 2. did not wholly

wholly abrogate the power of the Justices of Peace, or of any other Justices to whom Authority was given by *23 Eliz. 1. § 8. N. 1. supra* 72. in relation to the offences of Recusancy or of saying or hearing Mass, but that they might after *29 Eliz. 6. § 2. N. 2.* take Indictments notwithstanding the negative words here, for this Statute restraines them only from proceeding to Conviction, but not from taking Indictments, as was held in Sir *Edward Plowdens* Case, cited *11 Co.* 63. in Dr. *Fosters* Case, and now by *3 Jac. 4. § 7. N. 1.* the power of Justices of Peace to hear and determine the offences of not coming to Church is again restored to them. *Infra* 103. 105.

xCXX. *Proces.*

Page 102, 103, 104. This Statute *29 Eliz. 6. § 3. N. 1.* medles not with any other way of Conviction than at the Queens suit by Indictment, as hath been said, and so is the Conviction here mentioned to be understood, for this Statute is not Introductory, of a new Law, nor gave the Queen any new or other remedy than what she had against the Recusant by *23 Eliz. 1. § 5. N. 1.* that is by Indictment, but only gave her a more speedy way of proceeding upon that fundamental remedy. *11 Co. 60.* and *1 Rol. 93.* Dr. *Fosters* Case.

So that a Conviction upon an Information against the Recusant upon *23 Eliz. 1. § 11. N. 1.* or any other way, save by Indictment, doth not appropriate the penalty of twenty pound *per* month to the King for the

the time to come by force of 29 *Eliz.* 6. § 3. *N.* 1. *Infra* 165. *Supra* 72. *Hob.* 205. *Pie* and *Lovel*, nor for the ſame perſon by force of 3 *Jac.* 4. § 8. *N.* 1. where the ſame words are uſed, and a Conviction by Indictment only intended as here.

2. In *Hob.* 205. Its ſaid that if a man at the making of 29 *Eliz.* 6. § 3. *N.* 1. had been Convicted of Recuſancy by any other means then by Indictment, he had not been bound by 29 *Eliz.* 6. § 3. *N.* 1. to pay the twenty ſhillings (it ſhould be twenty pound) a month from the Conviction, and if a man be now Convicted in *B. R.* by Indictment or otherwiſe, he cannot be proclaimed nor otherwiſe his penalty run on, which laſt words, Inferr that the Conviction here intended is only a Conviction, according to 29 *Eliz.* 6. § 5 *N.* 6. by Proclamation upon default.

3. But if we compare together 29 *Eliz.* 6. § 2. *N.* 2. which ſpeaks of a Conviction after the making of this Statute, and 29 *Eliz.* 6. § 2. *N.* 1. which ſpeaks of a Conviction before this Statute, the Contrary will evidently appear: for 29 *Eliz.* 6. § 2. *N* 1. muſt neceſſarily be intended of Convictions according to 23 *Eliz.* 1. § 5, *N.* 1. without any Proclamation, for the Proclamation in the Caſe of Recuſancy was not given until 29 *Eliz.* 6. § 5. *N.* 5.

And if a man had been Convicted of Recuſancy upon Indictment in *B. R.* or elſewhere before 29 *Eliz.* 6. § 5. *N.* 5. the forfeitures of twenty pound *per* month, ſhould

ſhould by force of 29 *Eliz.* 6. § 3. *N.* 1. have run on from the time of the Conviction, that is clear by the expreſs words of the former clauſe, 29 *Eliz.* 6. § 2 *N.* 1.

Then comes 29 *Eliz.* 6. § 3. *N.* 1. which provides what ſhall be done upon Convictions for the future, and appoints in that caſe, likewiſe the forfeiture of twenty pound *per* month to run on from the time of Conviction.

Both which Convictions as well before as after this Statute are granted to be meant only of Convictions upon Indictment, and there is no difference between the penning of theſe two Clauſes, 29 *Eliz.* 6. § 2. *N.* 1. 2. but that one reſpects the time paſt, and the other the time to come; but both appoint the penalty to run on. Now there is no reaſon to ſuppoſe that the makers of the Law intended the word (Convicted) in a more reſtrained ſenſe in this Clauſe 29 *Eliz.* 6. § 3. *N.* 1. then in the former Clauſe 29 *Eliz* 6. § 2. *N.* 1. where the penalty ſhould have run on upon any Conviction whatſoever upon Indictment, or that the Conviction in 29 *Eliz.* 6. § 2. *N.* 1. by Indictment upon 23 *Eliz.* 1 § 5. *N* 1. without Proclamation ſhould be wholly ſhut out of the latter Clauſe, 29 *Eliz.* 6. § 2. *N.* 2.

By Conviction therefore in theſe Clauſes, 29 *Eliz.* 6. § 2. *N.* 1. 2. ſeems to be meant ſuch Convictions upon Indictment as were warranted by the Statutes in force at the ſeveral and reſpective times here mentioned, that is to ſay, in 29 *Eliz.* 6. § 2. *N.* 1.

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a Conviction upon 23 *Eliz.* 1. § 5. *N.* 1. without a Proclamation.

And in 29 *Eliz.* 6. § 2. *N.* 2. a Conviction either with or without a Proclamation.

In either of which Cases the penalty of twenty pound *per* month shall run on by force of this Act 29 *Eliz.* 6. § 3. *N.* 1. and consequently it shall run on, if the Recusant be Indicted, Convicted, and adjudged in *B. R.* altho he cannot be Proclaimed there.

And accordingly it was agreed 1 *Rol.* 93. in Dr. *Fosters* Case, that where the Recusant is Convicted upon Indictment, the penalty should ever after run on, and be appropriated to the King and tis not restrained there to a Conviction upon Proclamation only.

4. But yet altho this Clause 29 *Eliz.* 6. § 3. *N.* 1. Extends as well to a Conviction upon 23 *Eliz.* 1. § 5. *N.* 1. as to a Conviction by Proclamation; yet every Conviction upon 23 *Eliz* 1. § 5. *N.* 1. is not here Intended; for if a man Indicted for Recusancy, do upon his Arraignment confess the Indictment to be true, and plead guilty: Or upon trial a Verdict pass against him; these are Convictions in Law, but yet by these Convictions he forfeits nothing untill Judgment, nor shall the penalty of twenty pound *per* month run on, or be appropriated to the King until Judgment be given by (Conviction) Therefore

is here 29 *Eliz.* 6. § 3. *N.* 1. to be understood Convicted by Proclamation or default; or Convicted by Verdict, Confession &c and adjudged, for so the word is here to be taken; *viz.* For Adjudged, or Attainted; unless it be in case of Conviction upon Proclamation; and in such a case it is to be taken in divers other Cases. *Infra* 173.

XCVII. *Days.*

Page 104. Upon 29 *Eliz.* 6. § 4 *N.* 1. That is the Term of *Easter*, or *Michaelmas*, which shall first happen; and not the next *Easter and Michaelmas* Terms both; for the Recusant ought to pay the whole penalty for the time conteined in the Indictment in the very first of these Terms next after his Conviction. 3 *Jac.* 4. § 8. *N.* 1. *Infra* 172.

XCVIII. *Seizure.*

Page 104. Upon 29 *Eliz.* 6. § 4. *N.* 3. **Take, seiz and enjoy.** But as to Lands and tenements there must first be an office found for the King, for regularly before the finding of such office, Lands or Tenements cannot be seized into the Kings hands. 2 *Inst.* 573. and 8 *Co.* 169. *Stoughters* Case. *Br. tit. Off.* 17. 55. *Com.* 486. *Nichols* Case.

XCIX.

Page 105. by 29 *Eliz.* 6. § 4. *N.* 3. the Queen was to have and enjoy two parts of the Recusants lands and Hereditaments *nomine pœnæ* or *districtionis*, until he had in some other manner satisfied her of the whole forfeiture of the twenty pound *per* month incurred for his Recusancy.

And the profits of those two parts should not

not have been accounted to go to the payment of any part of the ſaid debt or forfeiture, for the Statute 29 *Eliz.* 6. § 4. *N.* 3. Inflicted this forfeiture upon him meerly as a further penalty for his neglect of payment of the twenty pounds *per* month, as was reſolved by the two Chief Juſtices and Chief Baron *Trin.* 43 *Eliz.* in *Gages* Caſe 3 *Cro.* 845. 846. and by all the Judges 3 *Jac.* at *Ruſſel* houſe. *Jones* 24, *Standen* verſus *Univerſity* of *Oxford*, and *Whitton:* but now the law is altered in this point by 1 *Jac.* 4. § 5. *N.* 1. *Infra* 153.

Page 105, 106. A Recuſant is Indicted and convicted, and then failes of payment of the twenty pound *per* month, yet his goods are not forfeit to the King, by 29 *Eliz.* 6. § 4. *N.* 3. before ſeiſure, for the King hath his Election, whither he will ſeize them or no by *Coke* Chief Juſtice *B. R.* 12 *Jac. Cullom* verſus *Sherman*, 1 *Rol.* 7. *pl.* 8. C. *Chattels.*

2. A Recuſant lends mony, and for ſecurity hath a rent charge granted him in fee by deed indented with condition of Redemption, and takes likewiſe a Recognizance for performance of Covenants in the ſaid Indenture, the Recognizance is forfeited, and afterwards he is Indicted and convicted of Recuſancy and failes of payment of the twenty pound *per* month, in this Caſe the King ſhall have the recognizance by force of 29 *Eliz.* 6. § 4. *N.* 3. for when forfeited to the Recuſant, it is but a Chattel perſonal, and ſhall paſs to the

King by this word (Goods) for in an act of Parliament where the offendors goods are given to the King, all debts and personal Chattels and actions are thereby given him as well as goods in possession, and here in 29 *Eliz.* 6. § 4. *N.* 3. as (take and seize) referre to two parts of the Recusants Lands and Tenements, so (enjoy) referrs to goods, and the King shall enjoy the debt due by the Recognizance.

Nor doth it alter the Case, for that the Recognizance was acknowledged for performance of Covenants in an Indenture concerning a rent charge in fee, which seems to savor of the realty, for it was originally for the loan and forbearance of mony which is personal 12 *Co.* 1. 2. *Ford* and *Sheldon:*

3. If a man who is a Recusant take such a Recognizance in the name of another, the King upon his Conviction shall have the Recognizance; for when the Recusant was such at the time of the Recognizance taking, it shall be intended that it was done by Covin, and that he took it in the name of another with an intent to prevent the King of levying of the forfeiture: And such Covin shall not Bar the King, 12 *Co.* 2. 3.

4. If a Recognizance or obligation be forfeited to the King by force of 29 *Eliz.* 6. § 4. *N.* 3. he may grant it over as he may any other Chattel in Action under his private Seal 1 *Rol.* 7. *pl.* 8. *Cullom* versus *Sherman.*

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Page 106. A Rent of Inheritance, and an Advowſon in groſs are comprehended under this word; (Hereditaments) 29 *Eliz.* 6. § 4. *N.* 3. but whither the King may ſeize ſuch an Advowſon, as part of his two parts, and preſent by vertue thereof ſince 3 *Jac.* 5. § *N.* which gives the preſentation to the Univerſities, ſee *Infra.* CI. *Forfeiture.*

Page 106, 107. It hath been much diſputed whither Copyhold Lands are within this branch of the Statute 29 *Eliz.* 6. § 4. *N.* 3. (of all other the Lands Tenements and Hereditaments, lyable to ſuch ſeizure or to the penalties aforeſaid:) CII. *Copy-hold.*

For regularly in Acts of Parliment which are enacted for forfeiture of Lands, Tenements and Hereditaments, Copyholds ſhall not be forfeited, but only Lands, Tenements and Hereditaments which are ſuch as the *C.* Law, and not thoſe which are ſuch by cuſtome only, as Copyholds are.

And it was agreed in *Heydons* Caſe, 3 *Co.* 8 *Savil* 66 *pl.* 138. that where an Act of Parliament alters the ſervice or tenure or other thing in prejudice of the Lord, there general words in the act of Parliament ſhall not extend to Copyholds.

And if the King ſhould ſeize them by force of the general words 29 *Eliz.* 6. § 4. *N.* 3. Lands, Tenements and Hereditaments, the Lord would during the time they are in the Kings hands, loſe his Seigniory, cuſtomes and ſervices: But yet it was

held by *Manwood* Chief Baron, and Baron *Clerk*, 1 *Leonard* 97. *pl.* 126. in the Caſe of *Sulherd* and *Everet*, *Mich.* 30. *Eliz.* that Copyholders are within 29 *Eliz.* 6. § 4. *N.* 3. and altho *Manwood* ſeemed to grant that they are not within it directly by expreſs words, yet they both conceived they were within the intent of the Act, by reaſon, as *Manwood* ſaid of theſe words, (all other the Lands, *&c.* liable to ſuch ſeizure or to the penalties aforeſaid.)

2. But it was granted on all hands, that by theſe general words here 29 *Eliz.* 6. § 4 *N.* 3. the King hath not any eſtate given him in the Recuſants Copyhold Lands, but only a right and title to two thirds of the profits: By the Kings receiving of which the Lord cannot be impeached of his cuſtomes and ſervices, as he would be if the King ſhould ſeize the land it ſelf.

And a difference was there taken 1 *Leonard* 98. *pl.* 126. between an Act of Parliament which tranſfers an Eſtate to the King, and an Act of Parliament which gives him only the profits of the Eſtate: for in the firſt Caſe the Rule 3 *Co.* 8. that Copyhold Lands ſhall not paſs by general words, ſhall ſtand good for the prejudice that may otherwiſe accrew to the Lord: But where the Lords Seigniory, Cuſtome, and ſervices are not to be impeached or taken away (as here they will not by the Kings bare receiving of the profits) there it was ſaid Copyholds ſhall be included within the general words

words of Lands, Tenements and Hereditaments.

3. And yet see *Owen* 37. where this Case of *Sulhard* and *Everet*, is otherwise reported, and that it was at length after great debate adjudged that Copyhold Lands are not within 29 *Eliz.* 6 § 4. *N.* 3. nor are seizable for the Kings two parts: And according to this Judgment I take the modern practice of the Exchequer to have been that neither the Land it self nor the profits of Copyhold Lands are lyable to such seizure.

CIII. *Process.*

Page 107, 108. If the same be taken at any Assize or Goal-delivery, 29 *Eliz.* 6. § 5. *N.* 6. for if the Indictment had been taken before Justices of Peace, no Proclamation thereupon could have been made upon this Statute by the Justices of Assize or Goal-delivery, as was resolved in the Case of Sir *Edward Plowden*:

And therefore upon such an Indictment for Recusancy taken before Justices of Peace the Court was to remove the Indictment in *B. R.* and there process might have been made out against the Recusant and he Convicted: for the Justices of Peace could do no more than Indict, all other proceedings being taken away from them by this Statute 29 *Eliz.* 6 § 2. *N* 2. 11 *Co* 63. and 1 *Rol.* 94. but now by 3 *Jac.* 4. § 7. *N.* 1. the Law is altered in this point and the Justices of Peace upon Indictments taken before them may proceed to proclaime and convict the

Recuſant as well as Juſtices of Aſſize and Goal delivery, *ſupra* 95. *N.* 2.

CIV. Page 108. Upon ſuch default 29 *Eliz.* 6. § 5. *N.* 6. that is upon his default of appearance of record at the next Aſſizes or Goal delivery: For if he make ſuch appearance, that ſhall ſave his default of not rendring his body to the Sheriff: And the not rendring himſelf to the Sheriff ſhall be no Conviction, as *Wingate Crowne* 66. would make it.

CV. Page 108. As ſufficient a Conviction in Law, 29 *Eliz.* 6. § 5. *N.* 6. that is as if he were Convicted by Verdict, but not as ſufficient as if a Judgment were had againſt the Recuſant: For altho by force of 29 *Eliz.* 6. § 5. *N.* 5. and other Statutes, the Conviction upon Proclamation and default of appearance make a Recuſant lyable to divers penalties and Incapacities, and is in thoſe reſpects as forceable as a Judgment, yet it ſhall not in other Caſes have the force or effect of a Judgment, and therefore it was reſolved. 37 and 38 *Eliz.* in the Caſe of the general pardon, *Anno* 35 *Eliz.* where there is an exception of all penalties and forfeitures due to the Queen, and converted to a debt by Judgment, that notwithſtanding that exception, a Recuſant Convicted upon Proclamation was within the pardon, and the forfeitures due upon ſuch Conviction were thereby pardoned: for the debt was not due to the Queen by Judgment, but upon Conviction only, but otherwiſe it

it had been, if he had been Convicted according to 23 *Eliz.* 1. § 5. *N.* 1. without Proclamation, and Judgment had been given thereupon, 11 *Co.* 65. Dr. *Fosters* Case.

Page 109, 110, 111. Upon 29 *Eliz.* 6. § 6. *N.* 1. It was resolved by all the Judges *Mich.* 37 and 38 *Eliz.* 3 *Rol.* 94. in Dr. *Fosters* Case, that if a man had been Convicted according to this Statute 29 *Eliz.* 6. § 5. *N.* 5. by Proclamation upon default and afterwards conformed himself, he should be discharged of the penalty due upon his Conviction, notwithstanding these words 29 *Eliz.* 6. § 6. *N.* 1. and full satisfaction of all the Arrearages: and the reason of this is given by *Coke* Chief Justice *B. R.* for that 29 *Eliz.* 6. § 5. *N.* 6. saith that such Conviction should be as sufficient, as if there were a Verdict recorded, but 'tis only a Judgment which converts the penalty into a debt, and not a Verdict: And here all the penalties are discharged upon Conformity, unless such as are Converted into a debt 29 *Eliz.* 6. § 6. *N.* 1. But otherwise it would have been if there had been a Judgment against the Recusant, upon Tryal or Confession upon 23 *Eliz.* 1. § 5. *N.* 1. for then his Conformity would have come too late to have saved the penalty Incurred by his Conviction, for by the Judgment the penalty was Converted into a debt. CVI.

Quære tamen, Whither these words here 29 *Eliz.* 6. § 6. *N.* 1. Due and payable are to

to be understood, due and payable upon a Judgment only.

However now by 1 *Jac.* 4. § 1. *N.* 1. if the Recusant confirm either before or after Judgment, he shall be discharged of all penalties.

2. But the profits of the Recusants Lands taken before his Conformity, shall never be restored.

3. It hath been questioned upon 29 *Eliz.* 6. § 6. *N.* 1. if a Recusant Convicted by Proclamation upon default, had died before seizure of two parts of his Lands, whither his lands might have been seized after his death for the Arrearages of the 20 *l. per* month: or if they were seized in his life time, whither they should have been discharged after his death without payment of such Arrears. And the opinion of those who held that the seizure should neither ensue nor continue after his death, but that the Arrears were discharged, was pricipally grounded upon 29 *Eliz.* 6. § 6. *N.* 1. that (due and payable) extended only to Arrearages due and payable upon a Judgment and converted into a debt: But when the Recusant was Convicted by Proclamation, the penalty was never Converted into a debt, and therefore when he died there were no Arrearges due in the sense of 29 *Eliz.* 6. § 6. *N.* 1. for the heir to pay; and yet by (such offendor) here is generally intended all Recusants Convicted, as well by Proclamation upon default as upon

on Judgment; and the heirs of either ſhould have had the benefit of this Proviſo, (*viz.*) that upon the death of the Anceſtor no ſeizure ſhould enſue, or be continued; only in the Caſe of a Judgment the Arrears were to have been paid.

4. But there ſeems now to be no further need of this Queſtion, for 1 *Jac.* 4. § 3. *N.* 1. meets with both theſe Caſes: For if there be no ſeizure of the Recuſants Lands in his life time, the diſcharge of the heir will depend upon his Conformity; and if there were ſeizure, the two parts ſhall continue in his Majeſties poſſeſſion, till the Arrears are paid and ſatisfied.

But this 29 *Eliz.* 6. § 6. *N.* 1. is not intended of entailed Lands: For without any aid of this Proviſo, if a Recuſant Tenant in Tail be convicted by Proclamation upon default and dieth, neither any Seizure for the Arrears of the 20 *l. per* month ſhall enſue after his death; nor if they were ſeized in his life time ſhall the ſeizure be continued after his death, nor is the heir in Tail bound to pay any ſuch Arrears.

But if a Judgment be had againſt the Recuſant Tenant in Tail in his life time, the heir is bound in that Caſe.

5. If a Judgment was had againſt the Recuſant before 1 *Jac.* 4. § 5. *N.* 1. and he had died before ſeizure of the two parts of his Lands: the Queſtion was whither after his death they might have been ſeiz-

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ed by force of 29 *Eliz.* 6. § 6. *N.* 1. for the Arrears of the penalty Incurred in his life time: for that the Seizure here given is meerly in nature of a *nomine pœnæ*, or penalty inflicted for his contempt in not paying the 20 *l. per* month and ſhould not have gone in ſatisfaction of the debt, but the Queen ſhould have held the Land till the 20 *l. per* month were otherwiſe paid and ſatisfied; and when this penalty of ſeizure was not executed in the Recuſants life time, by his death the contempt was gone and conſequently the penalty inflicted for that contempt could not then be put in Execution. *Lane* 92, 93. *Beckets* Caſe *Lane* 107. *Halſeys* Caſe.

But now by 1 *Jac.* 4. § 5 *N.* 1. the ſeizure is not as a meer penalty for the contempt of non payment, but for the ſatisfaction of the King of the Arrears of 20 *l. per* month, and the profits of the Land ſhall go towards the payment and ſatisfaction thereof, ſo that now there is no queſtion, but the two parts of the Recuſants Lands may be ſeized after his death, unleſs the hair diſcharge himſelf by his Conformity.

4 Note in all theſe Caſes of ſeizure, where the Land is to be diſcharged upon the death of the Recuſant, altho an Affidavit be made of his death, and a diſcharge obtained thereupon, yet 'tis a rule in the Court of Exchequer, that a Commiſſion ſhall be Awarded, firſt to Enquire

Savil

Savile 130. *pl.* 201.

CVII. Page 111. This branch 29 *Eliz.* 6. § 7. *N.* 2. ſeems not to extend to all forfeitures for Recuſancy, for the power here given to the Lord Treaſurer, *&c.* is only in relation to thoſe forfeitures which are by 29 *Eliz.* 6. § 3. *N.* 1. 2. appointed to be paid into the receipt of the Exchequer, which are the forfeitures due to the Queen by Conviction upon Indictment, for this Act medles with no other; ſo that if the 20 *l. per* month be recovered in a popular ſuit by the Informer *qui tam*, *&c.* one third part thereof ought ſtill to be paid to the poor of the Pariſh only, according to 29 *Eliz.* 1. § 11. *N.* 1. notwithſtanding this act 29 *Eliz.* 6. § 7. *N.* 2.

35 Eliz. 1.

Of SECTARIES.

CVIII. *Religion.*

PAge 114. *Wingate Crown* 70. ſaith, that if any perſon above ſixteen years of Age obſtinately refuſeth to come to Church for a month, or impugnes the Queens Authority in Cauſes Eccleſiaſtical, he ſhall be committed to Priſon, 35 *Eliz.* 1. § 1. *N.* 2. which is a great miſtake, for no man ſhall be puniſhed by this Act for either of thoſe Cauſes, only the not coming to Church being only a precedent qualification required in the perſon whom the Act makes liable to the penalties thereof for the other offences therein mentioned *Crompton* 53.

2. And therefore if a man never comes to Church, yet he is no offender within 35 *Eliz.* 1. § 1. *N.* 2. unleſs he adviſedly or purpoſely move or perſwade another to deny or Impugne the Kings Authority in Cauſes Eccleſiaſtical, or to that end or purpoſe adviſedly and malitiouſly move or perſwade ſome other to forbear to come to Church or receive the Communion or to be preſent at Conventicles, *&c.* or if he himſelf be preſent at ſuch Conventicles, *&c.*

3. And on the other hand if a man move

or

or perſwade any other to deny or Impugne the Kings Authority in Cauſes Eccleſiaſtical, or to forbear to come to Church or receive the Communion, or to be preſent at Convinticles, &c. Or if he himſelf be preſent at any Conventicles, &c. yet he is no offendor within 35 *Eliz.* 1. § 1. *N.* 2, if he goeth to Church once within the compaſs of a month.

4. So that the party muſt both forbear to come to Church, and be guilty of ſome other offences here enumerated, or he is not puniſhable by 35 *Eliz.* 1. § 1. *N.* 2. and as for the denying or Impugning the Kings Authority in Cauſes Eccleſiaſtical, its no offence within this Statute, unleſs the party moves or perſwades others ſo to do: and not then neither, unleſs he hath been abſent from Church by the ſpace of a month.

Page 114, 115. **Under colour or pretence of any exercise of Religion.** 35 *Eliz.* 1. § 1. *N.* 3. Altho this Act is commonly called the Act againſt Sectaries, as diſtinguiſhed from thoſe of the Romiſh profeſſion, yet in truth it extends to all Recuſants whatſoever, as well Popiſh as other, except 35 *Eliz.* 1. § 2. *N.* 1. in the point of abjuration, for Popiſh ſervice is performed under Color or pretence of Exerciſe of Religion; and the aſſembly or meeting of Popiſh Recuſants under ſuch Color or pretence is an aſſembly or meeting contrary to the Laws and Statutes: and they as well as others may be Indicted upon CIX.

on this Statute if they forbear to come to Church for the ſpace of a month, and be preſent at any part of the Popiſh ſervice, or move or perſwade, *ut ſupra*: And may be Impriſoned without Baile until they conform and make ſubmiſſion, as by 35 *Eliz.* 1. § 4. *N.* 1. is appointed, but they cannot be required to abjure unleſs they offend againſt 35 *Eliz.* 2. § 8. *N.* 2.

2. A Popiſh Recuſant is likewiſe ſubject to an Action of debt, *&c.* given to the Queen by this Statute 35 *Eliz.* 1. § 10. *N.* 2.

CX. *Proceſs.*

Page 115. Being thereof lawfully convicted 35 *Eliz.* 1. § 1. *N.* 5. that is convicted both of his abſence from Church and of that other offence which makes him puniſhable by this Act (*viz.*) going to Conventicles or moving or perſwading *&c.* for his abſence from Church for a month muſt be laid down preciſely in the Indictment, for without that the other is no offence within this Act.

2. And tis not neceſſary that the party be Convicted of ſuch abſence upon any prior Indictment, for altho there was never any former Conviction of him for Recuſancy, yet if he offend againſt this Act 35 *Eliz.* 1. § 1. *N.* 5. in any of the other particulars he may be Convicted both of that offence and of his abſence upon one and the ſame Indictment, and ſo was the Indictment *Mich.* 16. *Car.* 1. in the Caſe of *Lee* and others, 1 *Cro.* 593. *pl.* who were In-

ndicted upon this Statute, at the Seſſions of the Peace in *Eſſex*, for abſenting themſelves for a month from Church, and reſorting to Conventicles, to which they pleaded not guilty, and the Indictment was removed in *B. R.* to be tryed there.

Page 116. Being thereunto required by the Biſhop, *&c.* or any Juſtice of Peace, 35 *Eliz.* 1. § 2. *N.* 1. But put the Caſe that the offendor is Convicted, and the three months next after his Conviction elapſe, before he is required by the Biſhop or any Juſtice of Peace, or the Miniſter or Curate of the Pariſh, to conform and make ſubmiſſion here appointed; and afterwards he is required by one of them ſo to do. It ſeems in this Caſe ſuch requeſt comes too late, for he ought to conform and ſubmit within the three months, if he be required, but if he be not required, he is not bound to abjure for omitting it, altho he ſhall remain in Priſon till he conforms and ſubmits. But if within the three months he be required to conform and ſubmit, and refuſe, there is no queſtion but he may be at any time afterwards warned or required to abjure. CIX. *Oath.* *Conformity.*

Page 117, 118. That 35 *Eliz.* 1. § 4. *N.* 5. appoints the Conformity and ſubmiſſion to be **At any Church Chappel, or uſual place of Common Prayer**, but 35 *Eliz.* 1. § 4. *N.* 1. limits it to be **at ſome Pariſh Church**, the meaning whereof ſeems to be, that if a man be an offen- CXII.

dor against this Act and Convicted, he may within the three months after his Conviction conform and submit by 35 *Eliz.* 1 § 1. *N.* 5. in any Church Chappel or usual place of Common-prayer, where there is Common-prayer and either a Sermon or the Gospel read: *Infra* 145. But if he be required within the three months to conform and make submission, and he refuseth so to do, but the three months expire, then by 35 *Eliz.* 1. § 4. *N.* 1. his Conformity and submission must be more solemn and publick, (*viz.*) In some Parish Church, where it is presumed, there will be the greatest number of People to be Witnesses thereof.

And by this construction the seeming difference between 35 *Eliz.* 1. § 1. *N.* 5. and § 4. *N* 1. is reconciled, and this construction naturally flows from the order wherein these two branches are placed, for 35 *Eliz.* 1. § 1. *N.* 5. speaks of a Church Chappel or usual place of Common-Prayer, before it mentions the parties refusal to conform and submit within three months next after Conviction, but when it hath mentioned such refusal 35 *Eliz.* 1. § 2. *N.* 1. then it speaks of the Parish Church only and the second time here limited 35 *Eliz.* 1. § 4. *N.* 1. to the offendor when he may conform and submit (*viz.*) before he be warned and required to abjure presupposes his refusal to conform and submit within the three months, for otherwise he could not

not be required to abjure.

But if the offendor be not required within three months according to 35 *Eliz.* 1. § 4. *N.* 1. to conform and ſubmit, it ſeems he is not afterwards limited to ſome Pariſh Church, but may do it according to 35 *Eliz.* 1. § 1. *N.* 5. in any Church *&c.* for he is then in no danger of abjuration: and his Conformity and ſubmiſſion is then to no other end but to free himſelf from the Impriſonment inflicted on him upon his Conviction, and in that Caſe the Act ſaith he may conform and ſubmit in any Church Chappel or uſual place of Common-prayer.

And of this difference of places of Conformity no notice is taken in Additions to *Dalt. cap.* 81. *Sect.* 13. *tit.* Recuſants. *Church.*

2. By **Pariſh Church** 35 *Eliz.* 1. § 4. *N.* 1. is to be underſtood not only that which hath been alwaies the Mother Church and never belonged to any other, but every Church which hath the Adminiſtration of Sacraments and Sepulture. For that in Law is a Pariſh Church, altho it anciently belonged to another Church, 2 *Inſt.* 363. where the iſſue was whither it had *Baptiſterium* and *Sepulturam.*

And the Church of *Stoke Goldenham*, tho the Town was parcel of the Rectory of of *Hinckly*, whoſe Church was Anciently the Mother Church, yet having all parochial rights and Church-wardens, was adjudged a Pariſh Church, and within 43 *Eliz.*

CXIII. 2. § *N.* of the poor. *Hutton* 93. *Hilton* and *Pauls* Caſe.

Page 119. Theſe words **35 *Eliz.* 1. § 5. *N.* 3. Or any color or means of any diſpenſation**, are omitted by *Wingate Crown* 72. and other particulars faulty, &c.

CXIV. *Forfeitures.*

Page 120, 121. Theſe words **(All and every the ſaid paines duties forfeitures and payments,)** 35 *Eliz.* 1. § 10. *N.* 2. are not to be underſtood *ſimpliciter* or *Excluſive*, as if the forfeitures upon 23 *Eliz.* 1. § 5. *N.* 1. could be recovered no other way than is preſcribed here: But only they give the Queen a new remedy for recovery of them which ſhe had not before, and take not away the remedy given by 23 *Eliz.* 1. § 5. *N.* 1. upon Indictment, nor that by 29 *Eliz.* 6. § 5. *N.* 6. upon Indictment and Proclamation, nor the Informers popular action given by 23 *Eliz.* 1. § 11. *N.* 1. for all theſe three are affirmative Laws, and do not abrogate one the other, but may well ſtand together.

2. And the meaning of them taken together, is, that if the Informer recover the forfeiture upon 23 *Eliz.* 1. § 11. *N.* 1. he ſhall have his part thereof, but if the offendor were Indicted at the Queens ſuit, and Judgment had againſt him upon 23 *Eliz.* 1. § 5. *N.* 1 or if he were Convicted upon Proclamation and default upon 29 *Eliz.* 6. § 5. *N.* 6. the Queen ſhould have

have the whole penalty excluding the Informer, for he ſhall not be puniſhed again for the ſame offence at the ſuit of the Informer.

3. But if the offendor were neither Indicted nor ſued by the Informer *Qui tam, &c.* the Queen ſhould have another remedy to recover the intire forfeiture by Action of debt *&c.* upon this Statute 35 *Eliz.* 1. § 10. *N.* 2. ſo that the remedies given by theſe three Statutes 23 *Eliz.* 1. § 5. *N.* 1. 29 *Eliz.* 6. § 5. *N.* 6. and 35 *Eliz.* 1. § 10. *N.* 2. are Cumulative, and not Privative.

But as 35 *Eliz.* 1. § 10. *N.* 2. doth not abrogate any of the former laws touching Recuſancy, nor takes away the Informers popular ſuit; ſo it adds nothing as to the Informer, nor gives him any more ſpeedy remedy for the recovery of the forfeiture, but leaves him in the ſame condition as he was in before to take his remedy upon 23 *Eliz.* 1. § 11. *N.* 1. Dr. *Foſters* Caſe 11 *Co.* 61. 62. and 1 *Rol.* 90. 91. 93. 2 *Cro.* 481. 8 *Bridgman.* 121. 122. *Parker* verſus *Webb.*

Page 121. To her Majeſties uſe.) CXV. 35 *Eliz.* 1. § 10. *N.* 2. before this Statute the Queen had no other way to recover the intire penalty for Recuſancy or any other offence within 23 *Eliz.* 1. § 5. *N.* 1. but by Indictment only, but by this Statute 35 *Eliz.* 1. § 10. *N.* 2. a more ſpeedy remedy was given her by Action of debt, bill, plaint or Information.

CXVI. *Days.*

Page 121, 122. Shall and may be recovered. 35 *Eliz.* 1. § 10. *N.* 2. the King by 31 *Eliz.* 5. § 5. *N.* 3. is restrained in this Case to three years after the offence committed, within which time he must persue the remedy here given him by 35 *Eliz.* 1. § 10. *N.* 2. for the recovery of the forfeiture.

But it seems that he is not restrained to two years, for 31 *Eliz.* 5. § 5. *N.* 3. where the forfeiture is limited to the King and him that will sue, there the Informer hath one year, and the King the next two years, if the Informer doth not sue within the first year of the three; and the restraint 31 *Eliz.* 5. § 5. *N.* 1. of the King to the two next years after the offence committed, extends not to this Case.

For altho the King is enabled by 35 *Eliz.* 1. 10. *N.* 2. to sue for the intire forfeiture, yet the intire forfeiture was not originally limited to the King only, for the Informer may sue upon 23 *Eliz.* 1. § 11. *N.* 1. as well as the King may upon this Act 35 *Eliz.* 1. § 10. *N.* 2. and where the Informer may sue, it was not the meaning of 31 *Eliz.* 5. § 5. *N.* 1. to limit the King to two years after the offence commited, but he may stay if he please till the Informers years is expired, and then 31 *Eliz.* 5. § 5. *N.* 3. gives him two years afterwards to sue for the penalty.

2. Much less is the King limited to sue upon 35 *Eliz.* 1. § 10. *N.* 2. within a year

year and a day, and what is said in Dr. *Fosters* Case, 11 *Co.* 65. (*viz.*) that for any forfeiture before the year and day, neither the King nor the Informer hath any remedy, for that that time is limited in certain by 23 *Eliz.* 1. § 8. *N.* 1. is a clear mistake of the meaning of that Statute, for the limitation there of a year and a day, extends only to the Kings suit by Indictment, and not to the popular suit given by 23 *Eliz.* 1. § 11. *N.* 1. much less to the Action of debt &c. given to the King by this Statute 35 *Eliz.* 1. § 10. *N.* 2. *supra* 79. *N.* 6.

CXVII. *Process.*

Page 122. If the King sue by any of these ways, of debt, bill, plaint or Information, 35 *Eliz.* 1. § 10. *N.* 2. no Proclamation can be made thereupon, for the Proclamation given by 29 *Eliz.* 6. § 5. *N.* 5. and 3 *Jac.* 4. § 7. *N.* 2. in case of Recusancy at the Kings suit is upon Indictment only. 11 *Co.* 62. Dr. *Fosters* Case.

CXVIII. *Courts.*

Page 122. This Statute 35 *Eliz.* 1. § 10 *N.* 2. adds to other Courts where the King may sue for Recusancy, or for saying or hearing of Mass: for by 29 *Eliz.* 6. § 2. *N.* 2. the Queen was limited to the Kings bench, the Assizes or general Goal-delivery, and that only by way of Indictment, but now by 35 *Eliz.* 1. § 10. *N.* 2. she might sue not only in those Courts by Indictment, but in *B. R. C. B.* or Exchequer by Action of debt, Bil, plaint or Information 11 *Co.* 61. Dr. *Fosters* Case.

But whereas tis there said that 35 *Eliz.* 1. § 10. *N.* 2. takes not off the restriction of the Informer *Qui tam, &c.* by 29 *Eliz.* 6. § 2. *N* 2. to the Courts there mentioned, this passage was occasioned by an opinion there held, 11 *Co.* 61. in the said Dr. *Fosters* Case, that the Informer *Qui tam, &c.* was restrained by 29 *Eliz.* 6. § 2. *N.* 2. to those Courts; but the opinion is not Law, nor was there ever any such restriction of the Informer, for 29 *Eliz.* 6. § 2. *N.* 2. intends only suits by Indictment, but toucheth not the popular Action or Information. *Supra* 95.

CXIX. *Bar. & Feme*

Page 122, 123 As &c. any other debt &c. should or may be recovered 35 *Eliz.* 1. § 10. *N.* 2. before this Statute the Queen had no way to recover of the Husband the intire forfeiture for the Recusancy of his Wife. *Infra* 270.

For if the Wife had been Indicted of Recusancy at the Queens suit, and Convicted thereupon, this had not affected the Husband, who shall never be charged for the act or default of his Wife, but where he may be made party to the Action or suit, as in an Action of debt, Trespas, Action upon the Case for words by the Wife *&c.* but not upon an Indictment.

2. And in this respect the Queen having before this Statute 35 *Eliz.* 1. § 10. *N.* 2. no remedy for recovery of the forfeiture but by Indictment, where the Husband could not be charged for his Wife, the Informer

mer was then in better Caſe than the Queen, for he may charge the Husband and Wife both for the Recuſancy of the Wife, and ſhall recover the forfeiture of him by 23 *Eliz.* 1. § 11. *N.* 1. *ſupra* 79. *N.* 10.

But upon the Conviction of the Wife upon Indictment, the Queen muſt have ſtaid till the death of the Husband before ſhe could have Levied the Forfeitures and if the Wife had died before her Husband it was utterly loſt in moſt Caſes.

But by 35 *Eliz.* 1. § 10. *N.* 2. the Queen might, and the King may at this day charge the Husband and wife joyntly by action of debt, bill, plaint or Information, for the Recuſancy of the Wife in ſuch ſort as he may be charged in any other action at Common-Law for the debt or Treſpaſs of his Wife, and the forfeiture for her Recuſancy ſhall be recovered of him. And this was the Principal end and ſcope of making this branch of the Statute, and to this purpoſe were theſe words added 35 *Eliz.* 1. § 10. *N.* 2. in ſuch ſort, and in all reſpects, as by the ordinary courſe of the Common Laws of this Realm, any other debt due by any ſuch perſon, in any other Caſe, ſhould or may be recovered. 11 *Co.* 61. 62. Dr. *Foſters* Caſe, and 1 *Rol.* 233. 234. *Roy* verſus *Law & Uxor. Savil* 25. *pl.* 59.

Page 123. The Statute here 35 *Eliz.* 1. § 11. *N.* 1. mentioned and called 28 *Eliz.* 6. is the ſame with 29 *Eliz.* 6. before: It being in ſome Books called 28 *Eliz.* in others 29 *Eliz.* CXX.

liz. but (as it ſeems) more properly 29 *Eliz.* 6. for the Seſſion wherein it was made was by Prorogation held 15 *Feb.* 29 *Eliz.* 1 *Anderſ.* 294. *pl.* 303. and 4 *Inſt.* 7.

CXXI. Page 123. Here 35 *Eliz.* 1. § 12. *N.* 1. *Wingate Crown* 77. mentions only a Feme Covert, leaving out the Popiſh Recuſant.

CXXII. Page 124. The late Additions to *Dalton Cap.* 81. *Sect.* 7. 'Tis ſaid, that no married Woman is puniſhable by this Statute 35 *Elizabeth*, but are thereout excepted, whereas in truth they are no where excepted throughout this Statute, ſave only that they ſhall not be compelled or bound to abjure. 35 *Eliz.* 1. § 12. *N.* 1.

For if a married Woman comes not to Church, but forbears for a month, and goes to Conventicles, or any other Meetings or Aſſemblies, under colour or pretence of the Exerciſe of Religion contrary to Law, Whether they be Popiſh or other, or perſwades others ſo to do, or to forbear the Church, or to impugne the Kings authority in Cauſes Eccleſiaſtical, ſhe ſhall be impriſoned by force of this Act, 35 *Eliz.* 1. § 1. *N.* 5. until ſhe conform and ſubmits her ſelf, but ſhe cannot be further proceeded againſt, ſo as to require her to abjure.

A married Woman by this Act, 35 *Eliz.* 1. § 10. *N.* 2. with her husband is likewiſe puniſhable for her Recuſancy, by action of of Debt, *&c.* brought againſt her and her Husband at the Kings Suit, ſo that 'tis a great miſtake to ſay ſhe is not puniſhable by this Statute.

Page

Page 124, 125. Upon 35 Eliz. 1. § 13. CXXIII. *N.* 1. Every abjuration as well as that for *Exile.* Felony is an Exile or Baniſhment, and if perpetual and by authority of Parliament, amounts to a Civil death, and therefore the Wife of a man baniſhed or abjured for ever, might ſue or be ſued without her Husband, as was ruled in the Caſe of the Lady *Maltravers*, 10 *Edw.* 3. and of the Lady *Belknap* 1 *H.* 4. 1 and 2 *H.* 4. 7.

2. And if a man be perpetually baniſhed by Authority of Parliament, unleſs it be for Felony, or by force of this Act 35 *Eliz.* 1. § 13. *N.* 3. his Wife ſhall be endowed living the Husband.

3. And if he had been perpetually baniſhed or abjured for felony, the Wife ſhould have had her joynture preſently, altho not her dower, as was reſolved 19 *Edw.* 1. in *Weylands* Caſe, and the reaſon is becauſe tho the Husband be naturally living, yet he is civilly and in the eye of the Law as a dead man.

4. But yet theſe Caſes are to be underſtood of a Baniſhment or abjuration for ever, and not of a Relegation or Exile for a time; for in ſuch Caſe, neither could the Wife ſue or be ſued without her Husband, nor could ſhe have her Dower or Joynture, during the natural life of her Husband, 1 *Inſt.* 132. 2 *Inſt.* 47. and 3 *Bulſt.* 188. *Wilmotes* Caſe, 1 *Rol.* 400. *pl.* 27. *Moor* 851. *pl.* 1159.

5. But if a Man be abjured by force of this

this Act, the Wife ſhall not have her Dower or Joynture during the natural life of her Husband, altho he be abjured for ever, but ſhe is in a worſe Caſe, than the Wife of a perſon perpetually baniſht was at the Common Law: For this Act 35 *Eliz.* 1. § 13. *N.* 2. by expreſs words gives his Lands, Tenements, and Hereditaments to the Queen, during his life, which is to be underſtood of his natural life, and the ſaving here of the Wives Dower, 35 *Eliz.* 1. § 13. *N.* 3. is not intended of the Dower, which ſhe might claim at Common Law preſently upon the abjuration of her Huſband, nor ſhall make void the former words of the Act, by which all his Lands are given to the Queen, during his natural Life, but his only the uſual proviſion made in Acts of of Parliament, which create any new felony, for the ſaving of the Dower of the Wife, after the death of the Husband, ſo that the meaning of this branch 35 *Eliz.* 1. § 13. *N.* 3. is, that if the Huſband refuſe to abjure, or abjure and refuſe to depart, according to this Act, or return without licenſe, yet the Wife ſhall be indowed

ed, and the Heir inherit his lands after he is naturally dead.

Page 125, 126. Note, that this Act 35 *Eliz.* 1. § 13. *N.* 4. being at first but temporary, was afterwards discoutinued, *Hutt.* 61, 62. But is since renewed by 3 *Car.* 1. 4. (5) § 21. *N.* 1. and declared to be in *Esse*, 16 *Car.* 2. 4. § 1. *N.* 1. and is in full force at this day. CXXIV. *Days.*

2. And in such Case it hath been questioned if a Statute be discontinued and afterwards revived, how an Indictment thereupon shall conclude, whither *contra formam Statuti* or *Statutorum*: For if a Statute be temporary, and afterwards continued for a longer time, or made perpetual and never discontinued, there without doubt it shall be *contra formam Statuti.* *Parliament.*

But it hath been held by some that where it was once discontinued and then revived, there it is as if there were two several and distinct Statutes, and the Indictment shall conclude, *contra formam Statutorum.* 9 *Eliz. Palmers* Case.

But others have held the contrary, and that there is not any difference in the Case of a Statute at first temporary, and afterwards, before any discontinuance continued

tinued for a longer time or made perpetual, and a Statute diſcontinued and then revived, but that it ſhall in both Caſes be held but as one Statute, and that the concluſion ſhall be *contrà formam Statuti*, and not *Statutorum*, unleſs where the Act of reviver makes any addition to the former Act, or increaſeth the penalty or forfeiture, for then there is no doubt but they are two diſtinct Acts of Parliament, and according to this latter opinion hath the practice been in Informations upon 5 *Eliz.* 9. of perjury, which determined 14 *Eliz.* and was revived 29 *Eliz.* 5. § 2. *N.* 3. and yet all Informations thereupon conclude *contra formam Statuti:* And ſo as it ſeems ought all Indictments upon this Statute of 35 *Eliz.* 1. § 13. *N.* 4. notwithſtanding its diſcontinuance and reviver. *Owen* 135. *Weſts* Caſe.

35 Eliz. 2.

Of CONFINEMENT.

CXXV. *Alien.*

PAge 128, 129. Born within any her Majeſties Realms or Dominions, or made denizen. 35 *Eliz.* 2. § 2. *N.* 1. So that all Popiſh Recuſants are not within this branch, as *Wingate Crown* 78. miſtakes, for it extends not to an Alien who

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is born out of the Kings Legeiance, unleſs he be made Denizen.

In the late Additions to *Dalt. cap.* 81. *Sect.* 14. this Clauſe 35 *Eliz.* 2. § 2. *N.* 1. is reſtrained to ſuch as are born in *England*, but it is clear, that it extends to all the Kings Natural Subjects, if they live in *England*, altho they were born in *Ireland*, or any other of the late Queens dominions beſides *England*.

By Denizen is here to be underſtood an Alien, who owes to the King an acquired Subjection or Allegiance, whether he be made Denizen by the Kings Letters Patents, or be Naturalized by Act of Parliament; for Naturalization includes all the priviledges of a Denizen, and ſomething more, and every one, who is naturalized, is thereby made a Denizen, altho he that is made a Denizen by the Kings Letters Patents is not thereby Naturalized.

Page 129, 130. Which being then a Popiſh Recuſant, this 35 *Eliz.* 1. § 3. *N.* 1. is the firſt Penal Statute, which was made againſt Popiſh Recuſants by that name, and as diſtinguiſhed from other Recuſants. CXXVI. *Recuſant.*

In the late additions to *Dalt. cap.* 81. *Sect.* 7. Its ſaid that the matter of Recuſancy ſtands in two particulars; Firſt, abſenting from the Church; Secondly, refuſing the Oaths preſcribed 1 *Eliz.* 1. § 19. *N.* 4. and 3 *Jac.* 4. § 15. *N.* 1. but this deſcription of Recuſancy is either too narrow or too large: For if in the large ſenſe, then the

the refusing to receive the Sacrament contrary to 3 *Jac.* 4. § *N.* by him that conforms and comes to Church, may be as fitly called a point of Recusancy, as the refusing the Oaths of Supremacy or Allegiance. But if in a strict and proper sense, then it extends only to the point of not coming to Church, and not to the refusing the Oaths of Supremacy or Allegiance. And in this last sense are all the Statutes to be understood, which inflict any penalty or disability upon a Recusant, or a Popish Recusant, unless where the not receiving of the Sacrament is particularly mentioned.

And this appears by the explanation which the Statutes make every where of Conformity (the Opposite to Recusancy) *viz.* repairing to Church, and more particularly 3 *Jac.* 4. § 2. *N.* 2. which saith, that the Popish Recusant, which conforms himself and repairs to the Church, shall receive the Sacrament, which words (**and repairs to the Church**) are explanatory of the former (viz. **which conforms himself**) so that this Conformity is not intended of taking the Oaths of Supreamacy or Allegiance, but consists only in repairing to Church, and consequently Recusancy (its opposite) properly so called, consists in absenting from Church.

And this appears further by 3 *Jac.* 4. § 12. *N.* 3. where 'tis said, that the Oath of Allegiance shall be required of him, who confesseth or denieth not himself to be a Recu-

Recuſant, or that he hath not received the Sacrament, where (Recuſant) cannot be underſtood in any other ſenſe than of him who forbears to come to Church.

2. An Information or Indictment againſt a Popiſh Recuſant for Recuſancy, is of the form with that againſt any other Recuſant (*viz.*) that he came not to his Pariſh Church, or any other Chappel, Church, or uſual place of Common-Prayer, but forbore the ſame by the Space of, &c. *Co. Entr.* 569. and 11 *Co.* 56. Dr. *Foſters* Caſe.

So that upon his Conviction of Recuſancy, it doth not appear upon Record, whether the Offender be a Popiſh or other Recuſant.

And therefore where this 35 *Eliz.* 2. § 3. *N.* 1. or any of the ſubſequent Statutes commands or prohibits a Popiſh Recuſant convict to do a thing, and a perſon convicted of Recuſancy, who is a Popiſh Recuſant, be indicted thereupon, his conviction muſt be ſet forth in the Indictment, with this or the like concluſion, *per quod prædict. A. B. devenit papalis recuſans convictus.*

So it is if a Popiſh Recuſant Convict be incapacitated to take, or to give, or diſpoſe of any thing, and another perſon be ſubſtituted by the Statute in his ſtead, as in the Caſe of a Preſentation by 3 *Jac.* 5. § *N.* in a *Quare Impedit* by the Chancellor and Scholars of the Univerſity, his Conviction muſt be ſet forth with an Averment, that he is *papalis recuſans.* 10 *Co.* 54.

And if a Popiſh Recuſant, whether convicted or not convicted, be ſo commanded, prohi-

bited or incapacitated in an Indictment or Information upon the Statute, it must be Averred that he is *Papists Recusans*.

3. A person, who hath a certain place of abode, is convicted for not coming to Church, and afterwards becomes a Papist, being none before; It seemeth, that he is not restrained by 35 *Eliz.* 2. § 3. *N.* 1. within the compass of five miles, because he was not a Popish Recusant at the time of his Conviction, for the adverb (then) cannot have relation to the foregoing words, (viz. having any certain place of dwelling and abode within this Realm) for then the sense would be, that if he be a Popish Recusant at any time when he hath a certain place of dwelling and abode within this Realm, and he were formerly convicted for not coming to Church, he shall repair to his dwelling within forty dayes after his Conviction, which may be a meer impossibility, for perhaps the forty dayes after his conviction expired before he became a Popish Recusant, and therefore the word (then) must of necessity relate to the subsequent words, touching his Conviction: And (being then a Popish Recusant) is as much as to say, being a Popish Recusant at the time of his Conviction; so that if he be convicted as a Recusant, yet if he be not then a Popish Recusant, he is not restrained by this Act 35 *Eliz.* 2. § 3. *N.* 1. if he be within this branch of the Statute (viz. One who hath a certain place of dwelling

and

and abode within this Realm.)

Page 130, 131. Above five miles, 35 Eliz. 2. § 3. N. 1. when an Act of Parliament speaks of miles, they are not to be taken as a Bird or Arrow may fly, but according to the nearest and most usual way, 3 Cr. 212. *Ming* versus *Earl*. CXXVII. *Measures.*

2. The Miles here 35 Eliz. 2. § 3. N. 1. I take to be intended of English miles, an English mile contains eight furlongs, each furlong forty poarches or Poles, and every Poarch or Pole sixteen foot and an half 4 Inst. 274. Dalt. Cap. 65. in. Weights. And so much was a mile explained to be 35 Eliz. 6. § N. by the same Parliament which made 35 Eliz. 2. against Popish Recusants, *London*, *Rast.* 252. where 'tis said eight furlongs to a mile, and not five furlongs, as 'tis mistaken in *Poulton*.

And yet in that Case of *Minge*, 3 Cr. 212. The Defendent in maintainance, that the *locus in quo*, was four miles from *Rye*, according to 23 Eliz. 5. § N. of words pleaded, that it was 4000 paces from *Rye*, reckoning five foot to every pace, where is meant the Italian mile, viz. 5000 foot, and not the English, which is 5280 foot, and no exception was taken to it by the Plaintiff, or the Court.

Page 131, 132. By comparing altogether 35 Eliz. 2. § 3. and 4. it will plainly appear, that the Statute puts a great difference between the Popish Recusant, who hath a certain place of abode in this Realm, and him that hath none; for to restrain a Popish Recusant who hath a certain place of abode CXXVIII. *Alien.*

within this Realm from travelling above five miles, there are three qualifications requisite by the Act 35 *Eliz.* 2. § 3. *N.* 1. That he be convicted of Recusancy. 2. That he be a Popish Recusant at the time of his Conviction. 3. That at the time of such Conviction he be within this Realm, and if either of these fail, he is not restrained by this Act.

But if a Popish Recusant have no certain place of abode within this Realm, but is ubiquitary, there no such qualifications are required; but if he be a Papist, and doth not usually repair to Church, but forbears so to do, he ought to repair to the place where he was born, or where his Father or Mother dwelt, and not to remove above five miles from thence, and that whether he be Convicted or not; for the Statute 35 *Eliz.* 2. § 4. *N.* 1. when it comes to speak of him, who hath no certain place of abode, leaves out all the aforesaid qualifications, 35 *Eliz.* 2. § 3. *N.* 1. required in him, who hath a certain place of abode.

2. And it clearly distinguishes between him who is convicted for not repairing to some Church, &c. which 35 *Eliz.* 2. § 3. *N.* 1. is required in those, whose abode is certain, and him, who doth not usually repair to some Church, which 35 *Eliz.* 2. § 4 *N.* 1. in those whose abode is uncertain, it is sufficient to bring them with the danger and penalty of this Law, if they repair not to the place appointed them by this Act, or remove above five miles from thence.

3. And

3. And 'tis observable, that in this Clause 35 *Eliz.* 2. § 4. *N.* 1. which speaks of the Popish Recusant who hath no certain place of abode, there is no mention made of Forty days to be allowed him after his Conviction, to repair to the place appointed him, the reason whereof is because it takes in the whole kind of such Popish Recusants, as well the not Convicted, as the Convicted, and makes no distinction between them, if they have no certain place of abode, *Et ubi lex non distinguit, nec nos distinguere debemus.*

4. Nor was it without great reason 35 *Eliz.* 2. § 4. *N.* 1. that ubiquitary Popish Recusants should be confined, whether they were Convicted or not Convicted; as for the other who have a certain place of abode it is to be presumed that the most considerable of them would be prosecuted and convicted for their Recusancy in the respective places where they dwell, and *de minimis non curat lex* may in this Case be applyed to persons as well as in other cases to things, but as for him who is fixed to no certain place, as he is the more dangerous of the two, so the more unlikely to be persecuted to a Conviction, being here one day and gone the next; and therefore the less taken notice of; and had 35 *Eliz.* 2 § 4. *N.* 1. taken in only such as are convicted, it would have been eluded and rendred ineffectual for want of a Conviction of the greater part of such ubiquitary Recusants.

5. The want of due conſideration of 35 *Eliz.* 2. § 3. and 4. in each of theſe parts of it hath occaſioned ſome miſtakes, and *Wingate Crown* 78. reſtrains both parts of it to Recuſants convicted, and makes no mention that ſuch as have no abode, muſt be in *England* at the time of their Conviction.

And in the late Additions to *Dalton cap.* 81. *Sect.* 14. tis not only ſaid that both ſorts muſt be Convicted, but that they muſt be in *England* at the time of their Conviction, which two things are only requiſite in ſuch who have a certain place of abode, and not in the other ſort who have no abode who are within the meaning and danger of 35 *Eliz.* 2. § 4. *N.* 1. without any precedent Conviction for Recuſancy.

CXXIX. *Lieu.* Page 134. A Popiſh Recuſant repairs to the place appointed him by this act 35 *Eliz.* 2. § 3. and 4. and keeps within his compaſs of five miles, but doth not preſent himſelf or deliver in his name, as 35 *Eliz.* 2. § 6. *N.* 2. he doth not forfeit his goods or Lands, for there is no particular penalty inflicted in this part of the Act for that omiſſion, nor yet in the ſubſequent branch 35 *Eliz.* 2. § 8. *N.* 2. for him that hath 20 marks *per annum* in freehold or goods and Chattels worth forty pound.

Indictment. But yet ſuch perſon may be Indicted for ſuch neglect and fined upon the general words 35 *Eliz.* 2. § 6. *N.* 1. which commands

mands the thing to be done: for where an Act of Parliament Commands any thing to be done, and inflicts no penalty, an Indictment lyeth against the person who ought to do it, for his neglect or omission 2 *Inst.* 55. 163. 3 *Cro.* 655. *Crouthers* Cafe.

Page 135, 136. If any such person or persons being a Popish Recusant 35 *Eliz.* 2. § 8. *N.* 2. that is, any popish Recusant within the former branches of the Statute, and none but such. *Dalton cap.* 45. *tit.* Recusants applieth 35 *Eliz.* 2. § 8. *N.* 2. to Popish Recusants Convicted, as if it concerned them, and them only, and so both at once extends and restrains the Statute contrary to its true meaning. For these words (any such person or persons) neither extend to all that are Convicted, nor are restrained to such only as are Convicted. CXXX. *Exile.*

For the Popish Recusant who hath a certain place of abode within this Realm, altho he be convicted, is not within 35 *Eliz.* 2. § 3. and § 8. *N.* 2. unless he were a Popish Recusant and in *England* at the time of his Conviction.

And the Popish Recusant who hath no place of abode within this Realm, is within 35 *Eliz.* 2. § 4. and 8. altho he were never convicted.

So that either of these sorts of Popish Recusants who have an Estate under value *viz.* he who hath no place of abode, and he who having a certain place of abode was

Convicted when a Popish Recusant and in *England*, and no other are lyable by 35 *Eliz.* 2. § 8. *N.* 4. to abjuration.

CXXXI. *Estates.* **Page 136. Of the clear yearly value of twenty marks above all charges.** 35 *Eliz.* 2. § 8. *N.* 2. A rent charge of forty pound *prr Annum* is issuing out of lands worth C. *l. per Annum*: A Popish Recusant lyable to be confined by this Statute, purchaseth for his life or in Fee parcel of of the Lands, of the clear yearly value of 20 Marks over and above what his proportion of the said Rent-charge comes to, this is an Estate of the clear yearly value of 20 marks within the meaning of this Act, and shall free him from abjuration: For altho, in strictness of Law, his Estate be not clearly so much above all charges, for that it is chargeable without yearly Rent of 40 *l.* yet in equity he shall pay no more then his proportion of it, which the Land he purchased will discharge, and yet yeild 20 marks *per Annum* clearly besides.

CXXXII. **Page 136, 137.** This Statute 35 *Eliz.* 2 § 8. *N* 2. (**Or Goods and Chattels**) being in the disjunctive (**Lands or Goods**) an Estate partly of Lands and partly of goods, will not satisfie the intent thereof and therefore if a Popish Recusant, who offends aginst this Act, hath 15 marks *per Annum* yearly in Lands, and be worth 30 *l.* in goods, altho this taken together be in truth an estate of more value then is here required, yet it shall not free him from abjuration

juration for 35 *Eliz.* 2. § 8. *N.* 2. doth not warrant any valuation of the goods and Lands together so as to supply the defect of the yearly value of the Lands by the Goods, or the defect of the value of the goods by the Lands, and therefore the Recusant must have such an Estate in the one or the other as will answer the Statute.

And this is not like the Case of Jurors upon 3 *H.* 5. § 2. *cap.* 3. § 1, *N.* 2. where tis said that the Juror shall have Lands, of the clear yearly value of 40 *s.* if the debt or damage declared amount to 40 marks, in which Case altho it be in the disjunctive debt or damage, yet it hath been adjudged that where the debt and damages doth amount to 40 marks it is sufficient, and the Juror must have 40 *s. per Annum* 1 *Inst.* 272. For in that Case the word (or) is cumulative, and (debt or damage) both amount to no more than one intire thing, *viz.* The value of the Cause or Action depending.

And it appears plainly to be the intent of the makers of the Law, 2 *H.* 5. *Sect.* 2. *Cap.* 3. § 1. *N.* 2. that no Cause declared to be of the value of 40 Marks, shall be tryed by Jurors of a less Estate; But in our Case the Lands and Goods are things of different natures, one real and the other personal, and cannot be regularly reduced under one and the same head, and therefore shall not be valued together, unless 35 *Eliz.* 2. § 8. *N.* 2. had expresly appointed such a valuation.

2. But

2. But yet if a Popish Recusant hath a lease for years and personal Goods, and both do amount in value to above 40. *l.* he shall be out of the danger of abjuration, for altho the lease is in the realty, and the goods are personal, yet they shall in this Case be valued together: For that by this Copulative (and) 35 *Eliz.* 2. § 8. *N.* 2. expressly so appoints, without distinguishing between the values of either, but makes it sufficient if both of them be of that value.

3. Mony secured upon a Mortgage of Lands is within the meaning of these words (Goods and Chattels): 35 *Eliz.* 2. § 8. *N.* 2. And if the Popish Recusant hath above 40. *l.* owing to him upon such Mortgage, he cannot be required to abjure.

CXXXIII. *Days.* Page 137. Within three months next after such person shall be apprehended or taken 35 *Eliz.* 2. § 8. *N.* 3. *Wingate Crown* 80. clearly mistakes the meaning, for he saith, that a Popish Recusant, whose Estate is under value, must make the submission prescribed by this Act within three months next after his arrival at his place of abode, which is a complicated Error; for he quites leaves out him who is to repair to the place where he was born, or his Father or Mother dwells; he makes the party lyable to such submission before he becomes an offendor by not repairing or not presenting himself, and giving in his true name of Travelling above five Miles: He speakes nothing of his being

being apprehended whereas by the Act he cannot be required to abjure until three months after his apprehension, and he turns the three months after his apprehension into three months after his arrival; all great miſtakes and fit to be taken notice of by Juſtices of Peace, whoſe part it is to require the ſubmiſſion and abjuration, that they may not be miſled in the Execution of this part of their office by truſting to that abridgment.

Page 138. Being thereunto required by the Biſhop &c. 35 *Eliz.* 2. § 8. *N.* 3. If the offendor be not before the end of the three months next after his apprehenſion required by the Biſhop, a Juſtice of Peace, or the Miniſter or Curate to make ſuch ſubmiſſion, he cannot be required afterwards, nor be compelled to abjure by force of this Act, but if he be required within the three months to make ſubmiſſion, and refuſe, he may be at any time afterwards warned or required to abjure. CXXXIV.

Page 138, 139. The Oath of abjuration 35 *Eliz.* 2. § 8. *N.* 4. may be in this form, or to this effect. CXXXV. *Exile.*

You ſhall Swear that you ſhall depart out of this Realm of *England*, and out of all other the Kings Majeſties Dominions, and that you ſhall not return hither or come again into any of his Majeſties Dominions but by the licence of our ſaid Soveraign Lord the King or of his heirs: So help you God. 3 *Inſt.* 217. *Stamford* 119. 120.

Wilkin-

Wilkinson, 66. hath set down another form &c. resembling that of a Felon &c.

This hear you, Sir Coroner, that I *J. M.* of *H.* in the County of *S.* am a Popish Recusant, and in the contempt of the Laws and Statutes of this Realm of *England*, I have and do refuse to come to hear Divine Service there read and exercised: I do therefore according to the intent and meaning of 35 *Eliz.* 2. § 8. *N.* 4. &c. abjure the Land and Realm of King *Charles*, now King of *England*, *Scotland*, *France and Ireland*, and I shall hast me towards the Port of *P.* which you have given and assigned to me, and that I shall not go out of the high-way leading thither, nor return back again &c. If I do, I will that I be taken as a Felon of our said Lord the King; and that at *P.* I will diligently seek for passage, and I will stay there but one flood and Ebb, if I can have passage; and unless I can have it in such space, I will go every day into the Sea up to my knees, assaying to pass over. So God me help and his holy Judgment.

But in alluding to the old Oath for Felony &c. *Wilkinson* is mistaken in the very Offence for which the Popish Recusant is to abjure by force of 35 *Eliz.* 2. § 8. *N.* 4. For the Offence is not his Refusal to hear Divine Service, for that is but one of the precedent qualifications of the person; but the Offence it self is of another nature *viz.* his not repairing to the place the Statute appoints him, or his removal from thence contrary to the Statute

Statute, or his not preſenting himſelf, and delivering his true name, as aforeſaid: Either of theſe, if he be a Popiſh Recuſant, within the meaning of this Act, is a Crime for which he ought to abjure, unleſs he prevents his abjuration by a timely Submiſſion: Nor is the Popiſh Recuſant bound to ſwear that he will not go out of the high way, or return back, or will tarry but one Flood and Ebb, or go into the Sea up to his knees: Nor ought the Coroner or Juſtices of Peace to require any ſuch Oath of him; for this is a new Offence made by a Statute Law, which doth not require the ſtrict form of Abjuration, as in Caſe of Felony; and altho the Felon were tied to theſe Circumſtances, yet the Recuſant is not nor ſhall be a Felon for omitting them, but 'tis ſufficient if he ſimply abjure, as 35 *Eliz.* 2. § 8. *N.* 4. directs, and go from the appointed Port within the time limited, and not return without Licence into any of the Kings Dominions.

He that thus abjures the Realm, doth yet owe the King his Ligeance, and remaineth within the Kings Protection. *Qui abjurat Regnum, amittit regnum, ſed non Regem; amittit Patriam, ſed non patrem patriæ, 7 Co. 9. Calvins* Caſe.

Page 139. The Offender is 35 *Eliz.* 2. § 8. *N.* 1. Strictly tied to depart from the ſame Haven aſſigned him, and within the time appointed him by the Juſtices of the Peace or Coroner; ſo that if he depart the Realm from any other Haven, or Port, or o- CXXXVI.

ver-

ver-stay his time, and depart afterwards; yet he is a Felon within this Act.

CXXXVII. *Ireland.* Page 139. 140. Or returns, or come again into any her Majesties Realms or Dominions. 35 *Eliz.* 2. § 10. *N.* 1. An Offender within this act abjures in form aforesaid, and departs this Realm, and afterwards goeth into *Ireland* without licence, and then returns into *England* with licence, which going into *Ireland* seems to be Felony by this Act.

But *Quære* how the offence shall be tried; not in *Ireland*, for this Statute binds not that Kingdom, nor can be taken notice of there, nor yet can it be tried in *England*, for that the Offence was done elsewhere; so that this is *Casus omissus* and cannot be punisht; for that no way of trial is appointed. *Crompt.* 53. 54.

CXXXVIII. Page 140. Instructed. 35 *Eliz.* 2. § 11. *N.* 1. Altho the party be no Jesuit, Seminary or Massing Priest; yet if there be cause to suspect him, and he refuse to answer whether he be so or no; such suspition and refusal, is ground enough for his Commitment.

CXXXIX. Page 140. 141. Having lawful Authority in that behalf 35. *Eliz.* 2. § 11. *N.* 1. This Clause seems to refer to 27. *Eliz.* 2. § 18. *N.* 1. Which appoints that the discovery of a Popish Priest, or Jesuit shall be made to some Justice of Peace, or higher Officer, who is to give Information thereof to some of the Privy Council &c. under

under the penalty of two hundred Marks. Which Statute of 27 *Eliz.* 2. § 13. *N.* 1. tho it do not in expreſs terms ſay, that the Juſtices of Peace, or other higher Officer ſhall examine the Prieſt or Jeſuit ſo diſcovered, yet in as much as it gives power to take Cognizance of the matter, it ſeems Implicitely to impower him to inform himſelf of the truth, whether the party be a Prieſt or Jeſuit or not, as well by examination of the party as otherwiſe, that he may be the better enabled to give Information thereof to ſome of the Privy Council &c. and one Juſtice of Peace having by 27 *Eliz.* 2. § 13. *N.* 1. lawful Authority to examine him, he hath authority likewiſe by this Statute 35 *Eliz.* 2. § 11. *N.* 1. to Commit him, if he be ſuſpected to be a Prieſt or Jeſuit, and refuſeth to anſwer whether he be ſo or no.

As for Maſter *Shepherd's* opinion in his ſure Guide *Cap.* 14. § 5. That there muſt be two Juſtices to commit a man by force of 35. *Eliz.* 2. § 12. *N.* 1. who is ſuſpected to be a Jeſuit or Prieſt, till he anſwers directly, I ſee no ground at all for it. CXL.

Page 141. Anſwer to the ſaid Queſtions, 35 *Eliz.* 2. § 11. *N.* 1. That is whether he be a Jeſuit, Seminary, or Maſſing Prieſt; for he is not bound to anſwer to any other Queſtion, nor can be Committed by force of this Act for his refuſal.

Page 141, 142. Urged by Proceſs. 35 *Eliz.* 2. § 13. *N.* 1. If a Popiſh Recuſant re- CLXI.

restrained by this act, be summoned by Warrant of a Justice of Peace, to appear before him; the Recusant ought not to travil to such Justice out of his compass of five miles; For altho a Justice of Peace's warrant be the Kings Process; yet it is not intended here, for these words (Urged by Protest) are restrained by the subsequent words, 35 *Eliz.* 2. § 13. *N.* 1. as requires the Recusants appearance in some one of the Kings Courts, and extend not to all Cases of summons and Process, as *Wingate Crown* 83. mistakes.

But if in the Case aforesaid the Warrant be to arrest the Recusant, and by force thereof he be carried by the Constable *&c.* out of the compass of five miles, there he is excused and forfeits nothing, for that it was done by Compulsion; and yet if there be any Covin between the Recusant and the Justice of Peace, or Officer, it may be otherwise.

CXLII. *Courts.* Page 142. In any her Majesties Courts 35 *Eliz.* 2. § 13. *N.* 1. All Courts wherein the Proceedings are directed by the Kings Laws, are the Kings Courts; and therefore a Court Leet, tho of an Inferior nature, and kept in the Lords name; yet is the Kings Court 5 *Co.* 39. *Gardies* Case *Hetley* 18.

2. If a Popish Recusant restrained by this Act, be cited into the Ecclesiastical Court; he may by force of this Proviso travel out of the compass of five miles to appear there

there 35 *Eliz.* 2. § 13. *N.* 1. For all Ecclesiastical Courts are the Kings Courts, and the Laws by which they proceed there, are the Kings Laws.

Page 142, 143. This 35 *Eliz.* 2. § 14. *N.* 1. Extends to all Cases in general, where the Popish Recusant ought to render his body to the Sheriff upon Proclamation, and is not restrained to a Proclamation upon an Indictment for Recusancy. CXLIII.

And therefore if a Popish Recusant confined by 35 *Eliz.* 2. had been proclaimed upon the Statute of *Marlebridge* 52. *H.* 3. 7. § 1. *N.* 1. in a Plea *de Custodia* as a *Deforceor*, he might lawfully have gone out of the compass of five miles; the like he may do at this day upon any other Proclamation commanding him to render his body to the Sheriff.

Page 143. Before he or they shall be thereof Convicted. 35 *Eliz.* 2. § 15. *N.* 1. A Popish Recusant confined by this Act, whose Estate is under value, is apprehended for offending against this Act 35 *Eliz.* 2. § 8. *N.* 1. and before the expiration of three months next after his apprehension, is Convicted of such Offence, and then before the three months expire, conforms and makes such Submission and Declaration as 35 *Eliz.* 2. § 8. *N* 3. and § 16. *N.* 1. is appointed, this Case, altho he come too late after Conviction to save the forfeiture of his lands and goods; yet he shall not be compelled to abjure; for the affirmative words here 35 CXLIV.

Eliz. 2. § 15. *N.* 1. That upon such Conformity, Submission and Declaration before Conviction, he shall be Discharged of all Pains and Forfeitures, do not carry in them the force of a Negative (*viz.*) that if it be after Conviction, he shall not be discharged of any of them; and by 35 *Eliz.* 2. § 3 *N.* 3. he is not compellable to abjure; if at any time within three months next after his apprehension he conforms confesseth and submits, as is there appointed.

CXLV. *Church.* Page 143, 144. It seems clear that no Submission, Confession, or Declaration can discharge the Popish Recusant who is an Offender within this Act, from any Pain or Forfeiture thereby inflicted, unless it be performed in some Parish Church: for there is a great difference between the penning of this Statute 35 *Eliz.* 2. § 15. *N.* 1. and 35 *Eliz.* 1. § 1. *N.* 5. for in 35 *Eliz.* 1. § 1. *N.* 5. there is an express deligation of the place where such Submission and Declaration shall be, (*viz.*) in any Church, Chappel, or usual place of Common prayer, whither the Offender comes; and this shall free him from his Imprisonment (*supra* 112. But 35 *Eliz.* 2. § 8. *N.* 3. Where 'tis said that he shall abjure unless he comes usually to Church, and make such Confession and Submission &c. His coming usually to Church cannot be applied to his Confession and Submission; for that is to be made but once, and not usually; and therefore there being no place appointed where this Confession and Sub-

Submission shall be made, we must necessarily have recourse to 35 *Eliz.* 2. § 15. *N.* 1. where a place is appointed *viz.* some Parish Church: So that the coming usually to Church without this formal Submission and Confession, or Declaration, in some Parish Church, frees not the Offender here in any Case from abjuration: Altho the coming to any Church Chappel or usual place of Common-prayer, and hearing Divine service, and making open Submission and Declaration there shall free an Offender within 35 *Eliz.* 1. § 1. *N.* 5. from Imprisonment.

Page 144, 145. **Submission** 35 *Eliz.* 2. § 15. and 16. If a Popish Recusant Indicted upon this Statute makes his Submission, and brings with him into *B. R.* a testimonial thereof; it is the Course of that Court to cause him there to make his Submission again upon his knees, which the Clerk of the Crown reads to him, and so was it done *Pasch.* 2. *Car.* 1. *Latch.* 16. in the Case of one *Throgmorton*; but *Jones* Justice said there was no Statute to compel him to this second Submission, and *Throgmorton* complained that he was not therein dealt with according to Law. CXLVI.

2. 35 *Eliz.* 2. § 16. *N.* 2. Is **Over her Majesty or within any her Majesties Realms or Dominions**: And not over her Majesty within any her Dominions as *Wingate Crown* 85. grosly misrecites; for that denies only Popes or See of *Romes* Authority over her Majesty; but not any other

ther Authority which they might claim over her Subjects: And 'tis clear by the disjunctive (or) which *Wingate* omits, that both these Authorities are intended to be denied by this Submission, these words (or any Colour or means of any Dispensation) which are a very material part of the Submission, are likewise omitted by *Wingate*.

CXLVII. *Certificate.* Page 145. Such Relaps 35 *Eliz.* 2. § 18. *N.* 1. with the Indictment thereof, is to be certified into the Court of Exchequer, as was done by the Justices of *B. R.* 1 *Bulstrode* 133 in the Case of *Francis Holt Pasch.* 9 *Jac.*

1 Jac. 4.

Of SEIZURES.

CXLVIII. Oath. Page 147. By the Oath of Obedience is here 1. *Jac.* 4. § 1. *N.* 2. meant the Oath of Supremacy in 1. *Eliz.* 1. § 19. *N.* 4. *supra*, and by that name it is here called afterwards 1 *Jac.* 4. § 3. *N.* 2. *Crompt.* 13.

CXLIX. Page 148. It hath been doubted on 1 *Jac.* 4. § 2. *N.* 1. whether these words (**According to the true meaning of the Statutes in that behalf**) do refer only to the manner of the Recusants Conformity, or

or to the time likewiſe when it is to be done, as well as to the manner: For if they refer to the time, then the Recuſant is ſtill bound notwithſtanding this Statute to Conform before Judgement according to 23 *Eliz.* 1. § 10. *N.* 1. or his Conformity afterwards ſhall not diſcharge him of the penalty.

But the better opinion is, that by theſe words (**according to the true meaning of the Statutes**) 1 *Jac.* 4. § 2. *N.* 1. is to be Intended only that the Recuſant muſt Conform in ſuch manner as is there appointed.

But as to the time, the general words 1 *Jac.* 4. § 2. *N* 1. have enlarged the time limited by 23 *Eliz.* 1. § 10. *N.* 1. For this Statute 1 *Jac.* 4. § 2. *N.* 1. is made in further favour of the Recuſant: So that now if he Conforms after Judgment, 'tis time enough, and he ſhall be diſcharged of all penalties in reſpect of his Recuſancy.

2. And if an Information *tam pro Domino Rege quam pro ſeipſo* be brought upon 23 *Eliz.* 1. § 12. *N.* 1. againſt the Recuſant; and after Judgment had againſt him thereupon he Conforms, he ſhall be diſcharged of the Judgment; but firſt his Conformity muſt appear of Record, otherwiſe the Court cannot take notice of it; and as for that his Remedies againſt the King, and the Informer muſt be ſeveral; for againſt the Informer he muſt bring his *Audita Querela* and againſt the King he muſt plead his Conformity, which he may do in this Caſe after Judgment, for that no *Audita Querela*

lieth against the King 11 *H.* 7. 10. and if he should not be admitted to plead, he would be without any legal Remedy to discharge himself of the forfeiture and Judgement as to the Kings part, whose Execution will not be hindered by the *Audita Querela* against the Informer: But if the Defendant neglect to put in his Plea, and Execution issueth for the King, and he be taken in Execution, he comes too late to plead his Conformity, and hath then no other way left to relieve himself as to the Kings part, but by his Petition to the King to pardon the Debt. 2 *Bulstrode* 324. 1 *Rol.* 95. Dr. *Fosters* Case: *Savil* 23. *pl.* 56. *Tiringhams* Case.

CL. *Heir.* **Page 149. If any Recusant shall hereafter die** 1 *Jac.* 4. § 3. *N.* 1. that is a Recusant either Convicted upon Proclamation and default, or Convicted by Verdict, Confession, *&c.* and adjudged: for in both those Cases, if the Recusant die, the discharge of the Heir depends upon his Conformity.

CLI. *Forfeiture.* **Page 149, 150, Of all and singular the penalties, Charges and Incumbrances,** 1 *Jac.* 4. § 3. *N.* 1. If Judgment be had at the Kings suit against a Recusant Tenant in Tail for Recusancy, this is a charge and Incumbrance within this Statute, of which the Heir in Tail shall not be discharged, unless he conforms, but must satisfie all the Arrears incurred in the life time of his Ancestor: For it being a debt to the

the King upon a Judgment, the entailed Lands are lyable thereto by 33 *H.* 8. 391. §. *N.*

But these two Clauses 1 *Jac.* 4. § 3. *N.* 1. discharge the Arrears of the 20 *l. per* month Incurred in the Recusants life time upon the Conformity of the Heir in such Cases only where the two parts of the Recusants Lands were not seized before his death: For if they are seized in his life time and continue so till his death, neither his fee simple Lands nor his Intailed Lands (if a Judgment were had against him for his Recusancy at the Kings suit) shall be discharged upon the Heirs conformity without payment of the arrears.

Page 150. 151. Where any seizure shall be had 1 *Jac.* 4 § 5. *N.* 1. That is a seizure upon either a Judgment against the Recusant by Indictment on 23 *Eliz.* 1. § 5. *N.* 1. or an Indictment and Conviction by Proclamation, and default of appearance, according to 29 *Eliz.* 6. § 5 *N.* 5. for the seizure of two parts of the Recusants lands was given the King by 29 *Eliz.* 6. § 4. *N.* 3. upon default of payment of the twenty pound *per* month in either of those Cases. CLII. *Seizure.*

Page 151. (Go towards the satisfaction and payment of the twenty pound.) 1 *Jac.* 4. § 5 *N.* 1. Hereby a Principal Branch of 29 *Eliz.* 6. is altered; for whereas by 29 *Eliz.* 6. § 4. *N.* 3. *supra* 99. The Queen might for non-payment of the Forfeiture, have seized two parts of a CLIII.

Convicted Recusants Lands *Nomine pœnæ*, and as a gage or penalties until the 20 *l. per* month had been paid, and yet the profits should not have gone towards the satisfaction of the said 20 *l. per* month. 1 *Jac.* 4. § 5. *N.* 1. was made for ease and benefit of the Recusant in that point; so that now, if two parts of his Lands be seized for default of payment of the forfeiture, the profits received to the Kings use, shall go towards satisfaction thereof, and when the forfeiture is paid out of the profits, the Recusant shall have his Land again, unless in such Case where the King by 3 *Jac.* 4. § 11. *N.* 4. make his Election, and seizeth two parts in lieu of the twenty pound *per* month.

And therefore the Resolution or Judgment said to be 1 or 2 *Jac. Grayes* Case, cited in *Beckets* Case, *Lane* 93. and by *Bridgman* 16 *Jac.* in his argument of *Parker* and *Webbs* Case, 2 *Rol.* 25. and applied thereunto (*viz.*) that if a Recusant Convicted failes of payment of the 20 *l. per* month the King shall have his Lands as a gage or penalty, and the profits shall not go in satisfaction thereof: However it were true as the Law stood upon 29 *Eliz.* 6. § 4. *N.* 3. and before the making of 1 *Jac.* 4. § 5. *N.* 1. yet 'tis not Law at this day, nor could be applicable to either of those Cases. *Lane* 93. of *Beckt* or 2 *Rol.* 25. of *Parker*, which can e to be debated long after this Act was made and the Law altered in that point.

Page

Page 151. Where any such seizure shall be had, &c. CLIV. 1 *Jac.* 4. § 5. *N.* 3. this relative (*such*) takes in both the Seizures before mentioned, *viz.* A Seizure upon Indictment and Judgment thereupon by 23 *Eliz.* 1. § 5. *N.* 1. and a Seizure upon Conviction on Proclamation and default according to 29 *Eliz.* 6. § 4. *N.* 3. and as in both these Cases the Recusant who failes of the payment of the 20 *l. per* month shall have the benefit to discount the profits received by the King, so the King shall in the like Cases of Seizure retain the two parts in his hands, after the Recusants death, until the residue of the debt or duty due and payable to the King be satisfied.

Page 152, 153. Two parts of the Lands &c. Of any such Recusant. CLV. This Clause. 1 *Jac.* 4. § 5. *N.* 3. extends not to Intailed Lands, unless where there is a Judgment for the King against the Ancestor for his Recusancy: And therefore if the Recusant Convicted upon Proclamation and default be Tenant in Tail, and two parts of his Lands be seized in his life time for non-payment of the 20 *l. per* month, and he die, the Arrears not being satisfied to the King, yet the Heir in Tail shall have the Land out of the Kings hands without payment of the Arrears: For that such Conviction is in nature of a Verdict only, and not of a Judgment, as was held in 1 *Rol.* 94. Dr. *Fosters* Case. *Dayes.*

2. And where a Statute gives to the King

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a ſeizure or forfeiture of Lands, it ſhall not be intended of Lands in Tail, unleſs it be expreſly ſo appointed by the Statute, or by force of ſome other Statute Cooperating therewith: In which Caſe the Intailed Lands may be charged by general words in the Statute, which gives the forfeiture or ſeizure; an inſtance whereof we have in the Caſe of a Recuſant Tenant in Tail, Indicted, Convicted and Adjudged upon 23 *Eliz.* 1. § 5. *N.* 1. for his intailed Lands ſhall remain after his death in the Kings poſſeſſion until the Arrears be ſatisfied, and that by force of 29 *Eliz.* 6. § 4. *N.* 3. and this Statute 1 *Jac.* 4. § 5. *N.* 3. Cooperating with the Statute 33 *H.* 8. 39. § 66. (26.) *N.* 1. which chargeth the Lands of the Heir in Tail with debts due to the King upon a Judgment had againſt the Anceſtor.

But otherwiſe 'tis in the Caſe of a *Præmunire* upon 16 *Rich.* 2. 5. § 2. *N.* 6. which ſaith the Lands and Tenements of the offendor ſhall be forfeit to the King; for there his entailed Lands ſhall be forfeit during his life only: And the reaſon is, for that general words in an Act of Parliament, unleſs aided by ſome other Act of Parliament, ſhall never take away the force of 13 *Ed.* 1. *Cap.* 1. 1§ *N. de donis Conditionalibus*, 1 *Inſt.* 130. 391. and 11 *Co.* 63. *Godbolt* 308. *pl. Sheffield* and *Ratcliffs* Caſe.

And therefore in 26 *H.* 8. 13. § *N* and 5 and 6 *Ed.* 6. 11. § *N.* which makes Intailed Lands forfeitable for Treaſon

ſon, the word Inheritance was added (any Eſtate of Inheritance) which expreſly denotes Lands in Fee Tail as well as Fee ſimple.

Now there being neither in this Act 1 *Jac.* 4. § 5. *N.* 3. or that of 29 *Eliz.* 6. § 4. *N.* 3. any expreſs appointment that the two parts of all Lands ſeized in the Recuſants life time wherein he had any Eſtate of Inheritance, ſhall after his death continue in the Kings poſſeſſion, nor no other Statute which chargeth the Heir in Tail with the forfeiture due to the King upon Conviction by Proclamation and default, the general words here 1 *Jac.* 4. § 5. *N.* 3. (that his Lands Tenements, &c. ſhall continue in the Kings poſſeſſion,) ſhall not inforce a conſtruction in prejudice of the Heir in Tail, who claimes by 13 *Ed.* 1. 1. *de donis conditionalibus*.

3. But where there is no Judgment the Recuſants Fee ſimple Lands ſhall after his death ſatisfie the intent of theſe Statutes, and ſo was the Law in reference to entailed Lands, upon 29 *Eliz.* 6. § 6. *N.* 1. which ſpeaks of the full ſatisfaction of Arrears in Caſe of the death of the Recuſant: And the Arrearages were to be paid by the Heir in Tail only in ſuch Caſe where there was a Judgment obtained by the King againſt the Anceſtor for his Recuſancy, but not where the Anceſtor Tenant in Tail was Convicted only upon Proclamation and default, for here in this laſt Caſe the Heir in Tail

Tail was not bound by the Statute 33 *H.* 8. 39. § 68. (26) *N.* 1. becauſe it is not a debt by Judgment as that Statute requires. *Moor* 523. *pl.* 691.

And thus the opinion *Trin* 43 *Eliz.* of the two Chief Juſtices 3 *Cro.* 846. is to be underſtood, for they held that if intailed Lands had been ſeized for non-payment of the twenty pound *per* month, and the Tenant in Tail had died, the iſſue in Tail ſhould not have had the Land out of the Queens hands before the debt were ſatisfied, but ſhould have been charged with the ſaid debt: At the end of 3 *Cro.* 846. *pl.* is added a *Dubitatur*; But yet the opinion there held ſtands good, if it be intended only of a Conviction of the Anceſtor by Judgment upon Trial or Confeſſion and not of a Conviction upon Proclamation and default.

CLVI. **Page 154. To any Colledge &c.** 1 *Jac.* 4. § 6 *N.* 1. extends only to publick houſes or Colledges, but not to ſuch as are bred beyond the Seas in any private Popiſh Family, and therefore 3 *Car.* 1. *cap.* 2 (3) § 1. *N.* 2. was made to ſupply that defect.

CLVII. *Scholars.* **Page 155.** Note all Grammar Schools are not here 1 *Jac.* 4. § 9. *N.* 1. excepted, but only publick or free Grammar Schools, nor yet all Gentlemens Houſes, but only of ſuch as are not Recuſants, in both which reſpects this Statute is defectively recited in the late additions to *Dalt. cap.* 87. *Sect.* 1.

3 Jac.

3 Jac. 4.

Of CONVICTIONS.

Page 158, 159. **Every Popish Recusant Convicted.** 3 *Jac.* 4. § 2. *N.* 2. *Wingate Crown* 98. Speaks Indefinitely, as if this extended to all Recusants whatsoever, which is contrary to the expres words of the Statute. CLVIII.

2. In an Information upon 3 *Jac.* 4. § 2. *N.* 2. for not receiving the Sacrament, the Conviction of the party for Recusancy ought to be shewed in certain, before whom, in what Court *&c.* for before he is Convicted of Recusancy he is not lyable to the penalty Inflicted by 3 *Jac.* 4. § 2. *N.* 2. for not receiving: And yet if it be only generally shewed in the Information that the defendant was Convicted in due form of Law, and the defendant doth not demur thereto, but pleads not guilty, and it be found against him, there Judgment shall not be staid for this defect, for he hath lost his advantage, and by his plea hath admitted *Information.*

mitted the point of Conviction; and at the trial, the only thing in issue was; whether he had received the Sacrament, and not whether he was Convicted. 2 *Cro.* 365, 366. *Sivedal* and *Lenthal.*

CLIX. *Conformity.* Page 159. This Conformity 3 *Jac.* 4. § 2. *N.* 2. need not be set forth in the Information in every particular Circumstance, as when, or before whom the Popish Recusant Conformed himself: For it is sufficient if it be said that he went to Church, and continued there dureing Divine Service, and afterwards neglected to receive the Sacrament *&c.* and upon such Conformity and neglect, he is liable to the Penalty inflicted by this Act, altho he never went before the Ordinary. 2 *Cro.* 366.

CLX. *Forfeiture.* Page 159, 160. And for every year after such not receiving forty pound. 3 *Jac.* 4. § 3. *N.* 2. Note the Statute saith, not that the Offender shall forfeit for the first, second, and third Offence; but for the first and second year, and for every year after.

For if it had been said, he should have forfeited twenty pound for the first Offence, forty pound for the second, and sixty pound for the third; he must have been Convicted, and have had Judgment of the first Offence, before he could have incurred the penalty for the second, and of the second before he could have incurred the penalty for the third; and every one of these Offences

fences must have appeared *Judicialiter*, which could not be *ante Judicium*.

But here 3. *Jac.* 4. § 3. *N.* 2. where 'tis said he shall forfeit twenty pound for the first year, forty pound for the second, and sixty pound for every year after, it is otherwise, and the Offender shall forfeit sixty pound for the third year, altho he was never Convicted for the first or second.

2. And therefore in an Information upon 3 *Jac.* 4. § 3. *N.* 2. for sixty pound against a Popish Recusant Convicted for Recusancy, who hath conformed and neglected to receive the Sacrament the third year after his Conformity; its sufficient to set forth that he was a Popish Recusant, and was convicted and conformed himself, and went to Church &c. two years before such a day, and that after the said day, he failed for a whole year to receive the Sacrament, without mentioning what he did the first or second year after his Conformity; and so was 2 *Cro.* 365.

Page 160. **Shall for every such Offence lose and forfeit threescore pounds.** 3 *Jac.* 4. § 3. *N.* 3. If a Popish Recusant once receive the Sacrament, after his Conformity, and after neglect so to do within the time prescribed by this Act 3 *Jac.* 4. § 1. *N.* 2. and is guilty of such neglect for two years together; altho, he was never convicted for the first year, yet an Information lieth against him, and he shall forfeit threescore pound for the second year; CLXI.

for

for 3 *Jac.* 4. § 3. *N.* 3. he is liable to pay so much for every Offence, that is for every year wherein he neglects to receive the Sacrament after he hath once received it: and the Informer is at his liberty, for which Offence or year, he will inform whether for the first, second *&c.* and the reason of this is, because here are no steps or gradations to encrease the penalty for the second or third Offence, but the penalty is equal and alike in this Case for every Offence.

2 It is observable that the Popish Recusant, who after his Conformity receives the Sacrament, and afterwards neglects so to do, for the space of one or more years; is in worse Condition than he who conforms and receives it not at all; for in this last Case he shall forfeit but twenty pound for the first, and forty pound for the second year; but if he once receive the Sacrament, and afterwards neglect it for the space of two years, he shall forfeit for each of those years threescore pound.

CLXII. **Page 160. To him that will sue for the same.** 3 *Jac.* 4. § 3. *N.* 4 An Information upon this Branch must be brought by an Informer *Qui tam &c.* within a year after the Offence or neglect, or he can take no advantage thereof; for such an Information is within 31 *Eliz.* 5. § *N.* 2. *Cro.* 366.

CLXIII. *Justices.* **Page 160. Or before Justices of Assize &c.** 3 *Jac.* 4. § *N.* 3 5. Note, that not-

notwithstanding these words, an Information upon this Statute by an Informer, *Qui tam, &c.* for not receiving the Sacrament cannot be brought before Justices of Assize, or Goal-delivery, or Justices of Peace; for no Common Informer can sue for the King and himself before any of those Justices, but must sue in one of the Courts of Record at *Westminster*.

Page 161. Of all and all manner of Popish Recusants. 3 *Jac.* 4. § 4. *N.* 1. As this Act is penned, it seemeth that the Churchwardens and Constables are not bound thereby to present the monthly absence from Church of any of the Children or *Servants*, of a Popish Recusant, altho such Children or Servants be Recusants, unless they are Popish Recusants, and that 'tis sufficient to satisfie 3 *Jac.* 4. § 4. *N.* 2. to present their names, without taking any notice of their absence from Church. CLXIV.

But if they be Popish Recusants, they fall within the general words of the Act, and their monthly absence ought to be presented as well as that of their Parents, or Masters; and in this *Wingate Crown* 100. hath clearly mistaken; for he tells us that the monthly absence of all the Children and Servants, of a Popish Recusant, ought to be presented.

Page 162, 163. To enquire, hear, and determine. 3 *Jac.* 4. § 7. *N.* 1. This is intended of Indictments only, and revives the power of the Justices of Peace, CLXV.

given them by 23 *Eliz.* 1. § 9. *N.* 2. *supra* 72. and taken from them by the negative words of 29 *Eliz.* 6. § 2. *N.* 2. *supra* 95. *N.* 2. so that now the Justices of Peace may proceed to Judgment against the Recusant upon 23 *Eliz.* 1. § 5. *N.* 1. or convict him upon Proclamation and default; and so may the Justices of Assize, and Goal-delivery proceed either way: For the words of 3 *Jac.* 4. § 7. *N.* 2. and of 29 *Eliz.* 6. § 5. *N.* 5. which give the Proclamation, being in the Affirmative, do not take away the proceedings upon 23 *Eliz.* 1. § 9. *N.* 2. but that the Justices may waive the Conviction by Proclamation if they please.

Nor is the Informers popular suit 23 *Eliz.* 1. § 11. *N.* 1. taken away by 29 *Eliz.* 6. § 4. *N.* 3. or by this Statute 3 *Jac.* 5. § 7. *N.* 2. Dr. *Fosters* Case, 11 *Co.* 61.

CLXVI. **Page 163. Against any person either for not repairing to Church &c.** 3 *Jac.* 4. § 7. *N.* 2. so that this branch of the Statute which gives the Conviction by Proclamation extends to other Recusants besides Popish Recusants, and is not restrained to this latter sort, but is misrecited in this particular, *Dalt. Cap.* 100. *tit.* forfeiture.

CLXVII. **Page 163. Shall be rendred to the Sherif &c. before the next Assizes &c.** 3 *Jac.* 4. § 7. *N.* 2. in 2 *Rol.* 108. *Bridgman* 122 in an action brought against Sir *John Web* and his Wife for recovery of twenty pound

pound *per* month for the Recusancy of the Wife; the defendants plead that the Feme was before that time Convicted for the same absence upon Indictment at the Kings suit, and Proclamation made that she should render her self at the next Assizes, and default of appearance thereupon, but it was resolved by the Court of *B. R.* that the plea was ill, and that this was not a Conviction according to Law, and therefore was in effect as no Conviction; for the Proclamation was Erronius in two points. 1. In the person to whom 3 *Jac.* 4. § 7. *N.* 2. saith it shall be proclaimed that the offendors body shall be rendred to the Sherif *&c.* but this Proclamation was, that she should render her self to the Justices of Assize: For the rendring of the body to the Sherif is a material point: And the intent of the Statute is not persued in this Proclamation, for the intent was, that Recusants being dangerous Members of the Common-wealth should be in the Custody of the Sherif, *&c. ne nocere valeant.*

2. In the time, when the Proclamation was, that she should render her self at the next Assizes, but 3 *Jac.* 4. § 7. *N.* 2. before the next Assizes; And when the Proclamation is ill, the Conviction for default of appearance thereupon cannot be good, nor shall Bar the King or the Informer of their Action: And altho by 3 *Jac.* 4. § 16. *N.* 1. That no Proclamation shall be avoided for any defect, *&c.* The Recusant

perhaps may be estopped to take such exception to the Proclamation, yet the King is not.

Note, that *Palmer* 40, 41. hath stated the difference betwen the Statute and the Proclamation, as here, and so was the truth of the Case, but in reciting *Bridgmans* Argument he reports it quite contrary, *viz.* that the Proclamation was, that the Recusants body should be rendred to the Sheriff, and that it ought to have been, that it should be rendred to the Justices of Assize, but this is a mistake, and contrary to the Statute and the truth of the Case.

CLXVIII. **Page 164. Or other Keeper of the Goal,** 3 *Jac.* 4. § 7. *N.* 2. a Keeper of a Goal may be by usage or prescription, 42. *Ass.* 7. and 1 *Inst.* 114. and if the person Indicted for Recusancy live in a Corporation where the Sheriff hath not to do, and he be proclaimed upon this Statute, he may render himself to the Keeper of the Goal there.

CLXIX. *Appearance.* **Page 164. Shall not make appearance of Record.** 3 *Jac.* 4. § 7. *N.* 3. and if the Recusant do appear of Record at the Assizes Goal-delivery, or general, or Quarter Sessions, it shall be sufficient to save his default altho he did not render himself to the Sheriff upon the Proclamation, and this is clear by the words of 3 *Jac.* 4. § 7. *N.* 3. which is grosly mistaken, *Wingate Crown* 102. who saith the Recusant shall be Convicted if he render not his body to the

the Sheriff or Bayliff of the Liberty, and that default be recorded.

2. This appearance on 3 *Jac.* 4. § 7. *N.* 3. muſt be in proper perſon, and not by Attorny, for none can at firſt appear by Attorny unleſs enabled by ſome Statute; and all appearances by the defendent in any Court, ought by the Common Law to be in perſon 10 *Co.* 101. *Bewſages* Caſe.

But after a Plea pleaded to an Indictment an Attorny may be admitted at the diſcretion of the Court, if they think fit, but not otherwiſe, and in ſome Caſes not not without a ſpecial Writ, directed to the Juſtices to that purpoſe, 16 *Ed.* 4. 5. *F. N. B.* 26.

3. The party Indicted and proclaimed on 3 *Jac.* 4. § 7. *N.* 3. who appears at the Aſſizes or Seſſions muſt take care that his appearance be entred of Record: For if the Clerk of the Aſſizes, or Clerk of the Peace, ſhould miſtake and inſtead thereof record his default, he hath no way to avoid his ſtanding Convicted; But he is put to his Action upon the Caſe againſt ſuch Clerk of the Aſſizes or Peace, ſee *Popham* 29. *Keilway* 180.

4. The perſonal preſence at the next Aſſizes or Seſſions of the Party indicted of Recuſancy, and proclaimed on 3 *Jac.* 4. § 7. *N.* 3. altho he continue there from the beginning to the ending is no ſufficient ground to record his appearance, nor ſhall ſave his default, for altho he be there perſonally

ſonally preſent and openly confeſs himſelf to be the ſame perſon who was Indicted, and againſt whom the Proclamation iſſued, yet if he deny to appear upon the Proclamation, or to conſent that his appearance be entred of Record, it ſeems that his appearance cannot be recorded, but his default ſhall, and he ſhall ſtand Convicted thereupon.

And this is no more an appearance than where a Priſoner is brought to Common pleas Bar by *Habeas Corpus*, to the intent to have him appear to an Original brought againſt him, and he denies to appear to the Action, in which Caſe his appearance cannot be recorded, as was reſolved 43 *Eliz.* in *Aſcoughs* Caſe, *Gouldsborough* 118. *pl.*

CLXX. *Proceſs.* **Page 165. Shall be as ſufficient a Conviction in Law.** 3 *Jac.* 4. § 7. *N.* 3. That is, a Reculant thus Convicted upon Proclamation and default of appearance, ſhall be in the ſame condition as if he were Convicted by Verdict, but no Judgment is given. *Bridgman* 122. *Parker* verſus *Web.*

But this Conviction upon Proclamation is no Judgment, as was reſolved 11 *Co.* 65. in Dr. *Foſters* Caſe, and altho it ſhall make the Recuſant lyable to the ſeveral forfeitures penalties and incapacities inflicted on Recuſants convict, yet it ſhall not operate as a Judgment, as hath been already ſhewed in divers inſtances.

For this reaſon it hath been queſtioned whither

whither, if a Recuſant be Convicted upon Indictment and Proclamation, the King may not waive his advantage of this Conviction and bring his Action of debt given him by 35 *Eliz.* 1. § 10. *N.* 1. for that ſuch Conviction is no Judgment, and conſequently ought not to bind the King, as a Judgment againſt the Recuſant ſhould have done. *Palmer* 40. 41. Sir *John Webbs* Caſe.

Worſley obtained a Patent to have all the penalties of Recuſants Convict. Altho ſuch a Patent was illegal, for that the King cannot grant the penalty of a penal Law to a Subject, 1 *Rol.* 10 *pl.* 10. *Roy* verſus *Tollin*, *Hob.* 155. *Colt* and *Glover &c. Hob.* 183. *Daviſon* verſus *Barber.*

Yet admitting the Patent to be good, it was reſolved that the penalties of Recuſants Convicted by Proclamation ſhould not paſs by thoſe general words 1 *Rol.* 94. 95. Dr. *Foſters* Caſe.

Page 166. Once Convicted. 3 *Jac.* 4. § 8. *N.* 1. This extends to all Convictions whatſoever upon Indictment whither by Verdict Confeſſion, *&c.* Whereupon Judgment is given, as well as to Convictions upon Proclamation and default: And the penalty of twenty pound *per* month, ſhall in any of the ſaid Caſes run on forever after, and be appropriated to the King.

Page 166. Here 3 *Jac.* 4. § 8. *N.* 1. **Eaſter and Michaelmas.** Is to be taken CLXXII. *Days.*

disjunctively for *Easter* or *Michaelmas* as it is in 29 *Eliz.* 6. § 4. *N.* 1. *supra* 97. for the meaning is not that the Recusant shall have both of the terms of *Easter* and *Michaelmas* next after his Conviction wherein to pay the forfeiture of twenty pound for every month contained in the Indictment, but he ought to pay the whole into the Exchequer, the next *Easter* or *Michaelmas* Term, which shall first happen after his Conviction, and therefore if he be Convicted in *February*, he ought to pay the whole the next *Easter* Term, unless where the King chuses to seize the two thirds of his Lands by force of 3 *Jac.* 4. § 11. *N.* 4. as was admitted, *Jones* 24, 25. in *Standens* Case, *Hil.* 20. *Jac.* and *Pasch.* 16. *Jac.* in the Lady *Webbs* Case, *Bridgman* 121. who was Convicted in *March*; the pleading was, that in the *Easter* Term then next following, the said *Katherine* did not pay into the Exchequer according to the rate of twenty pound *per* month, without any mention of *Michaelmas* Term.

CLXXIII. **Page 166, 167, 168. For every month after such Conviction.** 3 *Jac.* 4. § 8. *N.* 2. by this Clause, and 29 *Eliz.* 6. § 4. *N.* 1. *supra* 96. *N.* 4. to the same purpose, after the Recusant is once Convicted the penalty of twenty pound *per* month shall run on without any new Indictment or Conviction, and shall be for ever afterwards appropriated to the King alone, and paid into the Exchequer; so that the

the Informer cannot bring any popular Action or Information for the twenty pound *per* month for any time incurred after ſuch Conviction, but is utterly barred 11 *Co.* 61. and 1 *Rol.* 93. Dr. *Foſters* Caſe, *Owen* 37. *Sulherd* and *Eveserds.*

2. 2 *Cr.* 481, 482. The Lady *Webb Paſch.* 16 *Jac.* was Indicted and Convicted of Recuſancy upon Proclamation and default of appearance, and afterwards an Informer *Qui tam &c.* ſued her and her Husband for a new offence of Recuſancy in the Wife ſubſequent to ſuch Conviction, to which they both pleaded the ſaid Conviction at the Kings ſuit, the Queſtion was whether the Informer ſhould be barred by this plea, or whether the Information was maintainable notwithſtanding ſuch former Conviction of the Wife, for that the Wife ſeems not to be ſuch an offender as is here intended 3 *Jac.* 4. § 8. *N.* 2. becauſe ſhe can have no Goods nor Lands, during the Husbands life, which may be ſeized for non-payment of the penalty, but it was granted on all hands that if ſhe had been a Feme ſole this had been a good plea in Bar of the Informers popular ſuit, for then ſhe had been bound to pay the twenty pound *per* month into the Exchequer, and ſhe ſhould not be doubly puniſhed both that way and at the ſuit of the Informer, and for the ſame reaſon it was urged that this Information would not lie againſt the Husband and Wife, for after the Husbands *Bar & Feme*

death

death she would be lyable to pay into the Exchequer all the Arrears after the rate of twenty pound *per* month from the time of her Conviction, and her Goods, and two parts of her Lands might be then seized for non-payment thereof: And if the Husband and Wife should in the mean time, at the suit of the Informer, pay twenty pounds *per* month for part of the same time, for which the Wife was lyable to pay after the Husbands death, this would be a double punishment, for one and the same offence; *supra* 79. *N.* 10. 17. *Infra* 270. *N.* 9.

3. And it was further said, 2 *Cro.* 482. That it was usual where the Wife was Indicted and Convicted for Recusancy, to seize by Exchequer-process the Lands and Leases which the Husband had in her right; and one *Woods* Case was cited to this purpose, which proves that a Feme Covert is within the meaning of the Act; 3 *Jac.* 4. § 8. *N.* 2. and therefore after she is once Convicted upon Indictment, shall be no more Subject to the Informers popular suit than a Feme Sole, but this last point is much to be questioned, for the Lands and Leases of the Wife are the Husbands during the Coverture; and 'tis a General rule that his Goods or Lands cannot be seized for the forfeiture or penalty where the Wife only is Indicted and Convicted of the offence.

4. A Recusant is Indicted for absenting himself

himself from Church for twelve months, and afterwards is Convicted upon that Indictment: *Quere*, whither nevertheless the Informer *Qui tam &c.* may not sue him for his absence, for the months intervening between the time laid in the Indictment, and the time of Conviction: For these words here 3 *Jac.* 4. § 8. *N.* 2. (*viz.* (**after such Conviction.**) seem to relate to the *proximum antecedens*, (**every month**) and to imply that the penalty here appropriated to the King, is only the penalty due for the months which Incurre after such Conviction upon Indictment at the Kings suit, but not to hinder the Informer after Conviction from suing for the months incurred before Conviction.

Page 168. Except in such Cases where the King shall &c. Refuse the same. 3 *Jac.* 4 § 8. *N.* 3. *Jones* 24. in *Standens* Case, if a man be Indicted and Convicted of Recusancy, the King is not bound to stay till next *Easter* or *Michaelmas* Term to see whither the Recusant will tender twenty pound for every month contained in the Indictment and incurred after such Conviction, for the King by 3 *Jac.* 4. § 11. *N.* 4. having his Election, whither he will accept thereof or seize two parts of the Recusants Lands, a Commission for seizure of the Lands may Issue out presently, if the King will waive the twenty pound *per* month, for he may take his Election as soon as he will after Conviction

CLXXIV. *Forfeitures.*

viction by *Jones* Juſtice.

CLXXV. **Page 168, 169. All the Goods.** 3 *Jac.* 4. § 9. *N.* 2. A Recuſant Convicted is Tenant for life, the remainder to a ſtranger in Fee, he in Remainder with the Recuſants Aſſent cuts down Timber Trees and ſells them, in this Caſe the King can be no wayes entitled to the Trees, 1 *Bulſtrode.* 133.

CLXXVI. **Page 169. All other the lands, &c. lyable to ſuch ſeizure or to the penalties aforeſaid.** 3 *Jac.* 4. § 9. *N.* 2. *Lane* 105, 106. *Halſeyes* Caſe. Lands are Conveyed to a truſt for *B.* a Convicted Recuſant; *Quære*, whither the King may ſeize ſuch Lands for the Recuſants non-payment of the twenty pound *per* month; for if he make his Election and accepts of two thirds in lieu of the twenty pound *per* month there is no queſtion but ſuch Lands are lyable to ſeizure for the words of 3 *Jac.* 4. § 11. *N.* 4. are that the King may ſeize two parts of all Lands that ſhall come to any other perſon, to the uſe of, or in truſt for ſuch Recuſants, but in 3 *Jac.* 4. § 9. *N.* 2. which relates to the ſeizure of two parts for non-payment the words ſeem to be more reſtrictive.

CLXXVII. **Page 171. Tho it be tendered or ready to be paid.** 3 *Jac.* 4. § 11. *N.* 4. by this branch of the Act, a new advantage is given to the King againſt the Recuſant for whereas by 29 *Eliz.* 6. § 4. *N.* 2. the Convicted Recuſant had his Election

to

to pay the King twenty pound *per* month, and ſo prevent the Seizure of the two third parts of his Lands, now by 3 *Jac.* 4. § 11. *N.* 4. that Election is taken away, and the choice is given to the King whether he will accept of the twenty pound *per* month, or refuſe it, and ſeize two third parts of the Recuſants Lands in lieu thereof, and if the King chuſeth the Lands, the tender of the twenty pound *per* month at the Exchequer will not ſave the Seizure, but the King ſhall enjoy the Lands notwithſtanding *Jones* 24, 25. *Standens* Caſe.

Page 171, 172, 173. Hereditaments CLXXVIII.
3 *Jac.* 4. § 11. *N.* 4. An advowſon is an Hereditament, and paſſeth by that word, 18 *Eliz. Dyer* 351. and is demiſable by 32 *H.* 8. 1. § *N.* as an Hereditament: And if it be an Advowſon in groſs, yet it may be ſeized by the King, by 3 *Jac.* 4. § 11. *N.* 4. as part of his two parts of the Recuſants Hereditaments, *Jones* 23, 24. for tis a thing valuable and ſhall be Aſſets, and is extendable for the Kings debt, and upon a writ of right of an Adowſon there ſhall be a Recovery in value, 9. 11. *ſcil.* for every mark twelve pence, *Hob.* 304. *Britton* 185. 1 *Inſt.* 185.

2. In the late additions to *Dalt. cap.* 81. *Sect.* 23. 'tis ſaid that the King may refuſe the twenty pound *per* month, and take to two parts of the Recuſants Lands and all the goods *&c.* And an Advowſon is not of 3 *Jac.* 4. § 11. *N.* 4. and *Standens* Caſe cited:

ed: But this is a miſtake as to the Clauſe it ſelf, and as to the point in Law and the Authority brought for it; for in truth there is no ſuch Clauſe in this Statute nor in any other, that the King upon the refuſal of the twenty pound *per* month, ſhould take the Recuſants goods; for the ſeizure of the Goods, is given 3 *Jac.* 4. § 9. *N.* 2. where the offendor failes of payment of the twenty pound *per* month, but not where the King diſchargeth him of that payment by refuſing it, ſo that where the King refuſeth the twenty pound *per* month the Recuſants Goods cannot be ſeized, but only two parts of his Lands.

The Law likewiſe is miſtaken, for if the King refuſeth the twenty pound *per* month, he may ſeize an Advowſon as part of his two parts, as hath been ſaid, ſo that an Advowſon is within 3 *Jac.* 4. § 11. *N.* 4. and not without it.

And the Caſe of *Standen* is quite contrary to that opinion in the late Additions to *Dalt. cap* 81. *Sect.* 23. for Juſtice *Jones* held ſtrongly that an Advowſon was within 3 *Jac.* 4 § 11 *N.* 4 and *Hobart* Chief Juſtice and *Winch*, declared themſelves to be of the ſame mind, and Juſtice *Hutton* denyed not that an Advowſon was within it, only held that the force of 3 *Jac.* 4. § 11. *N.* 4. as to an Advowſon in groſs is taken away by 3 *Jac.* 5. § 19. *N.* 1. which gives the preſentation to the Univerſity; but the three other Juſtices were againſt him, and held that where

where the King had ſeized it, as part of his two parts, and the Incumbent dyed, the King ſhould preſent, and not the Univerſity, *Infrà* 250. *N.* 5.

3. If the King ſeize by Inquiſition two parts of a Mannor belonging to a Recuſant Convict, to which an Advowſon is appendant by ſuch ſeizure, two parts of the Advowſon are likewiſe ſeized by conſequence, altho it be not named in the Inquiſition, as was reſolved in the Caſe of the Chancellor of *Cambridg* and *Walgrave*. *Hob.* 126. 127. *Moor* 872. *pl.* 1214.

And there, altho the King hath title, but to two parts of the Advowſon, yet he ſhall preſent alone by his Prerogative, and ſo he ſhould have done where there were three Coparceners of an Advowſon, two of full age, and one under age, and in ward to the King, the King only ſhould by his Prerogative have preſented, during the Wardſhip, 47 *Ed.* 3. 14. and 38 *H.* 6. 9.

But yet altho two parts of an Advowſon ſhall paſs, to the King by the word (Hereditaments) and the Seizure of the Mannor ſhall draw with it the Seizure of the Advowſon, yet the Kings two parts of the Advowſon ſhall not paſs from him by ſuch General words, and therefore if the King ſeizeth two parts of a Mannor belonging to a Recuſant Convict, to which an Advowſon is appendent, and grants over his two parts of the Mannor to a Subject, with all Hereditaments, appurtenances, *&c.* yet two parts of the Advoſwon will not paſs unleſs ſpecially named,

named, or the grant be *adeo plene & integre & in tam amplis modo & forma prout*, &c. The Recusant had the Manor, *Hob.* 126. *Moor* 872.

CLXXIX. **Page** 173. **In lieu and full recompence of the twenty pound per month.** 3 *Jac.* 4. §11. *N.* 4. So that if the King makes his Election, to seize the two parts, the Recusant is no longer lyable to pay the twenty pound *per* month, but the two parts of his Lands shall go in lieu and full recompence thereof, *Jones* 24. *Standens* Case.

CLXXX. **Page** 173. **Mansion-house**, is in Law most commonly taken for the Chief messuage or habitation of the Lord of a Mannor, or the Mannor-house, where he most remains or continues; *Termes de la Ley* 199. But it is to be taken here 3 *Jac.* 4. § 12. *N.* 1. in a larger sense for any other house which is the Recusants chief dwelling house.

CLXXXI. **Page** 174. These words **passing, &c. and unknown** 3 *Jac.* 4. §13. *N.* 4. being in the Conjunctive, it seems that the Bishop: or two Justices ought not to examine upon Oath, or tender this Oath to any passenger or Traveller, *quatenus* such, unless he be unknown *viz.* such an one as conceals his true name or quality for so it must be reasonable intended, and not of all Travellers through the Country as *Wingate Crown* 106. mistakes for it appears by the other qualifications here enumerated that the intent of the Act is that it shall be offered by the Bishop or two Justices to such only of whom there is any just Cause of suspition, 7 *Jac.* 6. §26. *N.* 2. *Infra* 260.

Page

Page 175. there to remain without Bail or mainprize 3 *Jac.* 4. §. 14. *N.* 1. The Bishop or two Justices can not take Suretyes of him who refuseth the Oath for his appearance at the Assizes or Sessions as *Wingate Coton.* 107. mistakes, but must commit him immediatly to Goal, nor can any other Court or Justices Bail him in this Case. CLXXXII. *Imprisonment.*

Page 175 Until the next Assises or General or Quarter Sessions 3 *Jac.* 4. §. 14. *N.* 1. This being in the disjunctive, the Bishop or two Justices have their Election to commit the Party refusing the Oath either until the next Assizes or until the next Sessions as they shall think fit, for some may be more aptly committed untill the next Assises, and some untill the next Sessions 12. to 131. CLXXXIII. *Justices.*

Page 175, 176. These words (any other Person whatsoever,) 3 *Jac.* 4. §. 14. *N.* 3. are Exclusive of the said Person or Persons who are committed for refusal, for 't is here in the disjunctive, so that it seems that if any person whatsoever of the age of 18 years, or above, and under the degree of a Nobleman or Noblewoman be at the Assizes or General Quarter Sessions of the peace, whether voluntarily, or brought in upon process on an Indictment of recusancy, or for any other matter, and be there tendered this Oath, and refuse to take it, altho it were never tendered to him before, yet upon his refusal there he incurs a præ- CLXXXIV.

minister, and in this respect this Statute 3 Jac. 4. § 14. N. 3. is more Exclusive than 7 Jac. 6. § 26. N. 6. where there must be a prior tender and refusal of this oath, otherwise a refusal of it at the Assizes or Sessions doth not make a præmunire by that act 12 Co. 131 *infra* 265.

CLXXXV. *Comes.* Page 176. shall incurre the danger and penalty of præmunire 3 Jac. 4. § 14. N. 3. If a man be committed by the Bishop or two Justices of peace for the refusal of this oath and the tender and refusal be expressed in the *Mittimus* the Justices of Assize or Justices of Peace in their Sessions are bound to take notice of this tender and refusal.

Indictment. And after they have there made the party a second tender of the oath, and he refuseth it, by which he incurrs a *præmunire*, the indictment against him to convict and attaint him of *præmunire* must contain all the special matter, *viz.* that he stood convicted or indicted of recusancy, or that he had not received the Sacrament twice within the year next before, or that passing through the countrey and unknown, being examined upon oath he confessed or denyed not, &c. (as the case is) and that the oath was tendered to him by the Bishop or two Justices of peace *Quorum unus*, &c. and he refused it; and that it was again tendred to him in open Court, and he again refused it: for in this case the *Mittimus* is the ground upon which he must be proceeded against at the Assizes or Sessions.

But

But if the firſt tender and refuſal be not expreſſed in the *Mittimus* or warrant of Commitment there altho there was a tender and refuſal of the oath before the Biſhop or two Juſtices, yet the Juſtices of aſſize or Juſtices of peace in their Seſſions can take no notice of it, but they muſt there tender him the oath without reference to any prior tender which they may do by ſuch of the General words (any other perſon whatſoever) 3 *Jac.* § 14. *N.* 3. and if he refuſe, he incurrs a *præmunire*, and in this caſe the Indictment may be ſhort and General (*ſcilicet*) that he was tendred the oath in the open Court and refuſed it, *&c.* and ſo it muſt be in all caſes where in truth there was never any prior tender and refuſal.

See 7 *Jac.* 6. § 26. *N.* 2. Whereby the power of the Juſtices of Peace is in ſome particular caſes enlarged in reference to this oath of Allegiance *infra* 266.

Page 179. unto which Oath ſo taken the ſaid perſon ſhall ſubſcribe his or her name or mark, 3 *Jac.* 4. § 15. *N.* 6. if a man refuſe to take any word of this oath, 'tis a refuſal of the whole, 1 *Bulſtr.* 198. *Lord Vauxes Ca:* CLXXXVI. *Oath.*

Page 179. 180. Outlary 3 *Jac.* 4. § 16. *N.* 1. a Termor for years was utlawed upon an indictment of Recuſancy, the term was ſold by the Lord Treaſurer and Barons of the Exchequer, and afterwards the utlary was reverſed. The Queſtion was whether upon reverſal of the utla- CLXXXVII. *Utlary.*

ry the recuſant ſhould have reſtitution of term again 3 *Cro.* 278 *Eyre* verſ. *Woodſine*

C. B. *Paſch.* 34. *Eliz. & Pellam* Juſtice doubted thereof, and obſerved that 11 *H.* 4 65. which ſaith, that the party outlawed ſhall upon reverſal of the outlary have reſtitution, ſpeaks only of Goods ſeiſed, but not of a term ſold before. But *Anderſon Ch. I.* and *Walmſley* held that the termor in this caſe ſhould have his term again in whoſoever hands the land came and upon whatſoever conſideration and not the money for which the term was ſold for the Outlary being reverſt it is as if there were no record of it, and the Queens intereſt was but conditional, *ſcilicet*, if the outlary were good, and judgment accordingly.

Nor is this like the caſe where a Sheriff upon a *fieri facias & venditioni exponas*, ſells a term, for there if the judgment be reverſed the party ſhall have the money for which the term was ſold, but not reſtitution of the term it ſelf as was reſolved 26 *Eliz. Dyer* 362.

And the reaſon is becauſe the Sheriff did no more than he was commanded; for he was commanded to ſell, and therefore the ſale ſhall be good to all intents. But in the caſe of an outlary it is otherwiſe, and there is no ſuch command, which difference between a *fieri facias & capias utlagatum*, was agreed in Doctor *Druryes Ca.* 8. *Co.* 143.

Preſentment. A man is ſeized of an Advowſon in groſs, the Church becomes void, and then the patron

tron is outlawed upon an indictment of recuſancy, whereupon the King preſents, the preſentee is inſtituted and inducted and afterwards the outlawry reverſed; in this caſe the patron ſhall be reſtored to his preſentment.

So if the patron of an advowſon in groſs hath judgment in a *Quare impedit* and is afterwards outlawed, for recuſancy and the King preſents, and the preſentee is inſtituted and inducted; in this caſe the patron ſhall have a *fi. fa.* to execute the judgment, and ſhall *oust* the preſentee of the King.

And the reaſon in both Caſes is, becauſe upon reverſal of an Outlawry the party ſhall, be reſtored to all things which are principal and here the preſentment was the principal thing forfeited by the Outlary, and therefore upon reverſal the patron ſhall be reſtored to it, *Moor* 269 *pl.* 421. & *Savil* 89 *pl.* 166. *Bluerleigh* verſ. *Cornwall.*

But if the King upon an Outlary ſeize a Mannor to which an advowſon is appendant and the Church becomes void, whereupon the King preſents, and the preſentee is inducted, there 't is otherwiſe, and the King's preſentee ſhall not be removed upon reverſal of the Outlary, for the preſentment in that Caſe is but as an acceſſory that follows the Principal, which is the Mannor, the profits of which Mannor the King was to have during the Outlawry, and conſequently the preſentment as a profit of the advowſon, which is a parcel of the Mannor.

CLXXXVIII. *Amendment*

Page 180. 181. Or other defect whatsoever 3 *Jac.* 4. § 16. *N.* 1. this is meant of Defects within the Indictment or other proceedings and not of any Collateral matter which the recusant hath to Discharge himself; as a pardon *Auterfoyts* Convict, *&c.* for the recusant is not hereby disabled to plead such Collateral matter but may take advantage thereof 11 *Co.* 65. *Doctor Fosters Ca.*

Nor yet is this 3 *Jac.* 4. § 16. *N.* 1. meant of all Defects whatsoever within the Indictment or other proceedings, for if there be any defect, which apparently tends to the Kings prejudice, the recusant may take advantage of it, and therefore 1 *Co.* 504. 505. in the Case of the Marquis of *Winchester*, who was indicted and convicted of recusancy, and had judgment thereupon, but *Ideo capiatur* was omitted, the judgment was reverst for that omission which is not aided by 16 and 17 *Car.* 2. 8. § 1. *N.* 12.

CLXXXIX. *Ouster le mere.*

Page 182. the Service mentioned throughout this Branch 3 *Jac.* 4. § P8. *N.* 2. is intended of Civil or Domestick as wel as Military, 3 *Inst.* 80. And altho 3 *Jac.* 4. § 19. *N.* 1. speaks there of Gentlemen and Persons of higher degree without poynting at any particular sort of service, so that to serve or go to serve a forreign Prince, *&c.* in any capacity whatsoever without first doing what is here required, is felony by 3 *Jac.* 4. § 18. *N.* 2. the passing or going out of this Realm to serve a for-

foreign Prince, &c. without taking the oath, or, if of that Quality, entring into bond, is felony by 3 *Jac.* 4. § 18. *N.* 2. altho the Party be never received into actual service, for the words are in the Disjunctive (go or pass to serve or voluntarily serve, 3 *Inst.* 80.

Page 182. Or shall &c. pass over the Seas and there shall voluntarily serve. 3 *Jac.* 4. § 18. *N.* 2. So if he pass over the Seas upon some other occasion and not with an intent to serve a foreign Prince, &c. yet if when he is there he voluntarily serves him, and did not before his departing hence take the oath, and if of that Quality enter into such bond, he shall incurr the penalty of the Law, and suffer as a felon, 3 *Inst.* 81. CXC.

Page 182 shall become bound by Obligation, &c. unto Our Soveraign Lord the Kings Majesty, 3 *Jac.* 4. § 18. *N.* 1. An obligat made to the Kings use is not sufficient, nor will satisfy the intent of the act, but it must be made to the King himself, for the bond must be *Domino Regi*, according to 33 *H.* 8 39. § 51 (1) *N.* 2. or the Officer who takes it is liable to imprisonment for taking the bond contrary to that statute: therefor *Wingate Corone* 112. lays a snare for the Officer of the Port, when he directs him only to take this bond to the Kings use, and he might have been informed out of 33 *H.* 8. 39. § 51. (1) *N.* 2. & 24 *H.* 8. 8. § 1. *N.* 3. of the difference between a CXCI. *Oblig.*

bond made to the King and to the King's ſuſe, *Savil* 13. *Pl.* 33.

CXCII. **Page 183. ſhall be a Felon**, 3 *Jac.* 4. § 18. *N.* 2. the offender againſt any part of this Branch of the Statute may have the benefit of his Clergy.

CXCIII. The Laws, *&c.* 183, 184. **which ſaid Cuſtomer and Controller** 3 *Jac.* 4. § 21. *N.* 2. Theſe words notwithſtanding the Copulative (*And*) are not to be taken Conjunctively, as if every bond and oath is to be certified both by the Cuſtomer and Controller; for if the Cuſtomer take the bond and oath, the Controller is not to be puniſht for not certifying, no more is the Cuſtomer if the Controller take them, for each of them ſhall forfeit for his own default, and not for the default of the other.

And it can not be reaſonably preſumed that one of them is privy to the doings of the other; And therefore theſe words muſt be conſtrued Disjunctively (*Cuſtomer* or *Controller* 3 *Jac.* 4. § 21. *N.* 2. that is, he of the two who takes the bond and oath is, to certify them into the Court of Exchequer, or to forfeit, *&c.* for where the literal ſenſe will ingender an abſurdity or impoſſibility, ſuch a conſtruction muſt be made as will ſtand with Reaſon and the intent of the Lawmakers; and in ſuch Caſes a Copulative ſhall be taken for a Disjunctive, or contra, *Com.* 289. 363.

But if the Deputy of the Cuſtomer or Con-

Controller take the bond or oath, and no Certificate thereof is made, the Customer or Controller himself, whose Deputy he is, shall forfeit for that default, altho he had no notice from his Deputy of the taking of the said bond or oath, for he is answerable for all the defaults of his Deputy, See *Dyer* 238, 239. where it was held that the Customer should forfeit the treble value of the Merchandize upon 3 *H.* 6 3. § *N.* for his Deputies concealing of the payment of the Customs; so a Sheriff shall answer for all his Officers under him, 4 *Co.* 33. *Miltons Ca. Crompt. Jurisd.* 110.

And so generally shall all other Officers answer for their Deputies, 9 *Co.* 48. 98. *Terms de Ley* 111. 32. *H.* 34. *Forfeiture Br.* 27.

CXCIV. *Alien.*

Page 185, 186. withdraw any of the Subjects of the King's Majesty, &c. from their natural obedience, 3 *Jac.* 4. § 22. *N.* 1. by the King's Subjects to be understood here Natural Subjects only, that is, such whose Subjection is Natural and absolute Due by Nature and Birth-right, and which begins with their Birth: and not Aliens, altho they are Naturalized or made Denizens, much less those who are only local Subjects: for none but Natural Subjects can be said to be withdrawn from their natural obedience, and as the King of *England* cannot be said to be a Natural Lord or King to an Alien born, so neither can an Alien be said to be his

his Natural Subject, Natural Prince and Natural Subject being correlatives.

And an Indictment of high Treason against an Alien born who resides here, altho it shall be *contra ligeantiæ suæ debitum & contra Dominum Regem* in respect of his local Ligeance, yet *naturalem* shall be omitted out of the Indictment, and so it was.

2 & 3 *Ph. & Mar.* in the Case of *Sherley* a French man & 36 *Eliz.* in the Cases of *Stephano Ferara de Grana* and *Emanuel Lewis Tmore* two Portugals, who conspired with Doctor *Lopez* against Queen *Elizabeth*.

And so as it seems it ought to be for the same reason if the Alien were indenized or naturalized: for Naturalization it self which is by Act of Parliament and the highest priviledg an Alien is capable of, yet cannot create this natural Subjection or Obedience which is not due by any Law or Constitution of Man: Naturalization being but a fiction in Law which confers the privileges of a Natural Subject but cannot make him a Natural Subject who was none before, for then he would have two natural Princes, one where he was born, the other where he was naturalized, *Vaughan* 279. 289. *Crane* and *Ramsey* 7 *Co.* 567. 25 *Calvins Ca.*

2 and 3 *Ph.* and *Mar. Dyer* 145 *Hob.* 171. *Countess Ca.* So that to absolve, persuade withdraw or reconcile an Alien born whose Subjection to the King began not with his Birth, or for any such to be absolved, persuaded, withdrawn or reconciled seems not

to

to be Treason within this Act; 3 *Jac.* 4. § 22. *N.* 1.

But this Subjection is not to be understood locally, or in respect of the place of a man's birth, but in respect of the Prince to whom Subjection is due at the time of his birth: and therefore if a Scot or Irish-man be absolved or reconciled in *England*, altho the Offence be committed in another Kingdom than where his Subjection began, yet being born a Subject to the King of *England* it's Treason in the absolver or person reconciling, and in him that is absolved or reconciled: nor is it necessary in all Cases that the Party be born in the King's Dominions, but that he may be a natural Subject notwithstanding, and consequently within this Act, 3 *Jac.* 4. § 22. *N.* 1. as in the Case of an Ambassador, 7 *Co.* 18. *Calvins Ca.*

CXCV. Page 186, 187. which shall hereafter be reconciled 3 *Jac.* 4. § 24. *N.* 1. in the late Additions to *Dalt.* Cap. 140 Sect. 12. is intimated that this Clause extends to no Cases of Treason or Misprision of Treason: for there in reciting 3 *Jac.* 4. § 24. *N.* 1. the Cases of Treason and misprision of Treason are excepted which is a great mistake, for the Submission here spoken of 3 *Jac.* 4. § 24. *N.* 2. is only in the Case of a declared Treason, *stil*, being reconciled to the Pope or See of *Rome*.

CXCVI. Page 187. For and touching the point of so being reconciled only,

3 *Jac* 4

3 *Jac.* 4. § 23. *N.* 1. there are three ſeveral ſorts of Offences made Treaſon, 1 To be willingly abſolved or withdrawn from a man's natural obedience. 2 To be willingly reconciled to the Pope or See of *Rome*. 3 To promiſe obedience to any pretended Authority of that See, or to any other Prince, State, or Potentate.

But in 3 *Jac.* 4. § 24. *N.* 1. only the ſecond of theſe Offences is remitted in caſe of Submiſſion, *viz*, the being reconciled to the Pope or See of *Rome*) by which I conceive to be meant the forſaking of the Religion eſtabliſhed by Law, and embracing that which is profeſſed and maintained by the Pope and Sea of *Rome*, and in that ſenſe theſe words, 3 *Jac.* 4. § 24. *N.* 1. are commonly taken at this day.

And that this is the meaning of 3 *Jac.* 4. § 24. *N.* 1. appears by 23 *Eliz.* 1. § 2. *N.* 1. which makes it Treaſon to abſolve or withdraw the Subjects from their natural obedience, or 23 *Eliz.* 1. § 2. *N.* 3. to move them to promiſe obedience to the See of *Rome* or any other Prince, *&c.* to anſwer which follows in that Act 23 *Eliz.* 1. § 2. *N.* 5. three other Sorts of Treaſon, *viz*, 1 To be abſolved or withdrawn: Or 2 To be reconciled: Or 3 To promiſe ſuch Obedience, ſo that the Offence of being reconciled anſwers to the Offence of withdrawing the Subjects from the Religion eſtabliſht to the Romiſh Religion, which explains what is meant by ſuch Reconciliation, *viz*,

viz, the being ſo withdrawn from the one Religion to the other.

But by this Chance 3 *Jac.* 4. § 24. *N.* 1. if a Perſon be thus reconciled, that is, change his Religion, and become a Papiſt, yet if he be capacitated to ſubmit as is required by this Act and ſubmit, accordingly, and take the oaths of Supremacy and Allegiance, ſuch offence of being reconciled ſhall not be Treaſon.

But as for being abſolved or withdrawn from his natural Obedience, Or 2 promiſing obedience to the pretended authority of the See of *Rome*, or any other Prince, State or Potentate beſides his Natural King, ſuch Submiſſion and taking the Oaths by 3 *Jac.* 4. § 24. *N.* 1. ſhall not abſolve him from that Guilt, but he ſhall have judgment, and ſuffer for the ſame, as in Caſe of high Treaſon, notwithſtanding ſuch Submiſſion, *&c.*

Dalt. Cap. 89 tit. High Treaſon is thereby clearly miſtaken in extending the benefit of this Submiſſion, 3 *Jac.* 4. § 24. *N.* 1. generally to all who have been willingly abſolved, withdrawn or reconciled, or have promiſed ſuch obedience.

CXCVII.

Page 188. The Offender may be proceeded againſt by force of this Act 3 *Jac.* 4. § 25. *N.* 1. in any County where he ſhall be impriſoned, for ſo the word [*taken*] is to be expounded, and the like expoſition hath been made uſe of 2 and 3 *E.* 2. § 6. *N.* 2. of Souldiers, & 1 *Jac.* 11. § 2. *N.* 3 of

N. 3. of having two Wives living, *Hall.* 131.

If the Offence be committed out of this Realm, yet it can not be tried upon 35. *H.* 8. 2. § 1. *N.* 2. for this Act 3 *Jac.* 4. § 25. *N.* 1. hath prescribed a special form of a Trial in this Case, which must be observed, and if such Offender be a Peer of *England*, the Indictment can not be taken before any others than the Justices of Assize and Gaol delivery in the County where he is imprisoned or the Justices of *B. R. Hall.* 13. the Lord *Digbyes* Ca.

CXCVIII. *Alien.*

Page 189. 190. by a Subject of this Realm, 3 *Jac.* 4. § 27. *N.* 1. is to be understood a Natural born Subject, or an Alien Naturalized here by Act of Parliament, or made a Denizen of *England* by the King's Letters Patents, but these words here are exclusive of two sorts of Subjects.

1. Of an Alien inhabiting this Realm, who oweth to the King a local Subjection or Ligeance, and is neither Naturalized or made a Denizen, for the word [*Subject*] is a mark of distinction, and must be necessarily exclusive of some persons or other within this Realm, and therefore can not be supposed to taken for meer Aliens, who if neither naturalized or made Denizens are only local Subjects and of the lowest form; for if no person inhabiting within the Realm were here intended to be excepted, the word [*Subject*] would be idle and to no purpose.

2. An

2. An Alien Naturalized by Act of Parliament in *Scotland*, or *Ireland* or made Denizen of either of those Kingdoms by the King's Letters Patents is, for the same reason, out of the meaning of this Branch 3 *Jac.* 4. § 27. *N.* 1. altho he live in *England*: for it seems that such a person is still an Alien here, and shall not partake of any privileges in *England* by his being Naturalized or made Denizen in *Scotland* or *Ireland*, their Acts or Laws not being obligative or concluding to us in *England*. *Vaughan* 278. 280, &c. *Craw* and *Ramsey*.

And therefore the Power here given any one Justice of Peace, 3 *Jac.* 4. § 27. *N.* 2. to levy the XII. *d.* per Sunday doth not extend to either sort of these Aliens.

But yet they may forfeit XII *d.* per Sunday for their absence from Church upon an Indictment on 1 *Eliz.* 2. § 14. *N.* 1. and that by force of the General words (every person or persons inhabiting within this Realm; so that what is said in Doctor *Foster's* Ca. 12 Co. 63. that this Statute 3 *Jac.* 4. § 27. *N.* 1. gives a more speedy remedy for the recovery of the XII *d.* is not to be understood of all persons within 1 *Eliz.* 2. § 14. *N.* 1. but only of the Subjects of this Realm in the Case of 3 *Jac.* 4. § 27. *N.* 1.

And if a man be born within any of the King's Dominions which were such and united with *England* in their Subjection at the time of his Birth, altho he be not born within *England*, yet if he live here he is a Sub-

Subject of this Realm within the intent of this Act 3 *Jac.* 4. § 27. *N.* 1.

For Natural Subjection and Legeance are not local or confined to that Kingdom or Countrey where he was born, but he is a natural Subject in any of the Dominions belonging at the time of his birth to the Prince under whom he was born, and upon that ground it was resolved 7 *Co.* in *Calvin's* Ca. that a man born in *Scotland* after the Union of the two Kingdoms, should inherit in *England*: So that a man born in *Scotland*, or *Ireland*, or any other of the King's Dominions which were such, and so united at the time of his Birth, if he live in *England*, is punishable by this Act, 3 *Jac.* 4. § 27. *N.* 1. and any Justice of Peace may grant his warrant to levy the XII *d.* for his absence from Church.

CXCIX. *Proof.* **Page 190. To the Satisfaction of the Justice of Peace**, 3 *Jac.* 4. § 27. *N.* 2. in this Case the Justice of Peace is sole Judge whether the excuse the Party makes for his absence be sufficient, and sufficiently proved, and the same can not be brought into question elsewhere by the Party.

CC. *Dayes.* **Page 190. Every Sunday**, 3 *Jac.* 4. § 27. *N.* 1. this repairing to the Church *every* Sunday must be as well to Evening Prayers as to Morning Prayers, for it ought to be an entire Day and an entire Service, by *Hutton* and *Bereley* Justices, *Dalt. Cap.* 45. *in.* Recusants.

Page

Page 190: To keep 12 d. for every such Default, 3 *Jac.* 4. § 27. *N.* 2. So that this forfeiture of XII *d.* may be levyed weekly, for it is due for every absence, as soon as the Sunday is ended, and hath no relation to the forfeiture of XX lb per Month given by 23 *Eliz.* 1. § 5. *N.* 1. but the offender may be punished both by 3 *Jac.* 4. § 27. *N.* 2. for his weekly absence, and by 23 *Eliz.* 1. §. 5. *N.* 1: for his monthly absence by *Coke* Ch. J. B. R. 1 *Roll* 94. Doctor *Foster's* Ca. CCI.

Page 198, 192. Willingly, &c. keep or harbour 3 *Jac.* 4. § 32. *N.* 1. *Accessory.* CCII.
A man freely and of his own accord takes an apprentice or covenant-servant for a certain time, and not knowing him or her to be a recusant, and such Apprentice or servant forbears to come to Church, it seems that the Master shall forfeit nothing, altho he keeps them in his house, for he doth no more than what the Law will compell him to do, during the time agreed on and limited for such apprenticeship or service, and this can not be said to be done willingly, for it is not in his choice to discharge them, untill the time is expired. But if the Master, before he took such Apprentice or other servant knew him or her to be a Recusant, or after their forbearance to come to Church retains them for a longer time than was at first agreed on, this is a keeping or harbouring them willingly, and he shall be liable to this penalty, 3 *Jac.* 4. § 33. *N.* 1. Infra 205.

CCIII. **Page 192. in his, her, or their service fee or Liberty,** 3 *Jac.* 4. § 33. *N.* 1. This extends to all Servants whatsoever, although they dwell not in the Master's house, nor are his menial Servants; for if they are retained in his service, fee or livery, as Bailiff, Steward, or in any other capacity, and forbear to come to *Church*, the Master shall be punished for their absence.

CCIV. **Page 192, 193. wanting without fraud or Covin other habitation or sufficient maintainance,** 3 *Jac.* § 34. 4. *N.* 1. A Father or Mother hath no settled habitation, but yet hath sufficient maintainance, the child receives such Parent into his house who forbears to come to Church, in this case the child shall forfeit X *l.* per month, for altho the Parent had no habitation, yet this is not a wanting habitation within the meaning of this Act, seeing he wanted not sufficient means to procure one.

But if the Parent hath an habitation, yet if he want sufficient maintainance to keep him in that habitation, altho he refuse to come to Church, the child shall forfeit nothing for receiving him into his house, for the words here 3 *Jac.* 4. § 34. *N.* 1. are in the Disjunctive, and if the Parent wants either other habitation in the sense of the Act, or sufficient maintainance, the Child may receive him.

CCV. **Page 193. that shall be committed by authority to the Custody, &c.**

&c. 3 *Jac.* 4 § 34. *N.* 1. The former Case of an apprentice was put only of such an one whom the Master takes of his own accord, *supra* 202. But if it be a Parish child bound by the Church-Wardens and Overseers with the assent of the Justices of Peace, if the Master be duely required to take him such Apprentice, as it seems is committed to the Master's custody within the meaning of this proviso, 3 *Jac.* 4. § 34. *N.* 1: for he is punishable if he refuse him, and if he were a recusant, or forbear to come to Church, yet the Master shall forfeit nothing for keeping or harbouring him.

A Serjeant at Armes, Pursivant, Messenger, *&c.* who keeps his prisoner in his house, or a Gaoler if he keeps his prisoner in his own house which is no part of the Prison, shall not forfeit any thing by force of this Act, 3 *Jac.* 4. § 34. *N.* 1. Altho he suffers him to go abroad in the Day-time at his pleasure, and he forbears to come to Church, for that such prisoner was committed by Authority to his Custody.

Page 193. *Standing excommunicated* 3 *Jac.* 4. § 35. *N* 1, *infra* a *Popish* recusant after conviction shall be disabled as an *excommunicate person*, yet to other intents he shall not be reputed as a person standing Excommunicate. CCVI.

Page 193 *for such recusancy*, 3 *Jac.* 4. § 35. *N.* 1. So that if a Popish recusant stand excommunicate for any other cause than for recusancy, this branch of the Statute doth not affect him. CCVII.

CCVIII. *Lien.*

Page 194 *wherein such offence shall happen*, 3 *Iac.* 4. § 36. *N.* 2. If a man serves or goes to serve a forreign Prince, State or Potentate without first taking the oath of Allegiance, or if of that Quality entring into bond altho part of the Offence was done out of the Realm; yet for that other part thereof (*viz.*) his going or passing over the Sea was done in the Realm, he shall be tried in the Court where that part of the Offence happened, that is where the haven or port is from whence he went or passed over, for a Statute is to be so expounded *ut verba accipiuntur cum effectu*, 3 *Inst.* 80.

CCIX. *Bar. & feme*

Page 195. *with any penalty or forfeiture by force of this Act*, 3 *Jac.* 4. § 40. *N.* 1. But yet a married woman may be punished by force of any other Act for not receiving the Sacrament during her Marriage, 11 *Co.* 94. Doctor *Foster's* Ca.

And therefore if she be a Popish Recusant convict, and receive not the Sacrament within the year next before her husband's death, she shall forfeit the profits of two thirds of her joynture and dower, and be further disabled, as 3 *Jac.* 5. § 10. *N.* 1.

And unless she receive the Sacrament after conviction, she cannot be plaintiff with her Husband in any action, but is disabled by 3 *Jac.* 5. § 11. *N.* 2.

And if she receives it not within three months after her Conviction, she may be imprisoned by 7 *Jac.* 6. § 28, *N.* 1. unless the husband pay to the King as is there appointed.

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Page 195 *For any such offence of not receiving*, 3 *Jac.* 4. §. 40. *N.* 1. *Wingate Coron.* 125. Quite mistakes the meaning of it, for a married Woman is not exempted from all penalty by force of this Act, but only from the Penalty for not receiving the Sacrament, during her marriage; and there is no question but she may be imprisoned by 3 *Jac.* 4. §. 14. *N.* 1. if she refuseth the Oath of Allegiance, and an Indictment of high Treason lieth against her upon 3 *Jac.* 4. §. 23. *N.* 1. If she be absolved or withdrawn from her obedience to his Majesty, or become roconciled to the *Pope* or See of *Rome*, or promise obedience to the said See, *&c.* CCX.

Page 196,197. *Where any Bishop or Justices of the Peace*, 3 *Jac.* 4. §. 41. *N.* 1. the Justices of Peace have a twofold power given them by this Act in reference to the Oath of Allegiance 1. Out of Sessions, and so any two Justices of Peace *Quorum unus*, *&c.* may tender the oath to any person by 3 *Jac.* 4. §. 13. *N.* 2. eighteen years old, or above, other than Noblemen or Noblewomen. 2. In their General or Quarter Sessions, and there they may by 3 *Jac.* 4. § 14. *N.* 2. 3. They may tender the oath to any such person who hath before refused it, or to any person whatsoever of or above that age, other than Noblemen or Noblewomen. CCXI. *Justices.*

Now whether the six privy Counsellours here mentioned 3 *Jac* 4. §. 41. *N.* 1. may re-

require the Oath of Noblemen and Noblewomen in all cases, where the Justices of Peace may require the same of any subject either in or out of Sessions: or only in such Cases, where they may require it out of Sessions, seems to be a question. For, if the power here given 3 *Jac.* 4. § 41. *N.* 1. to the six privy Counsellours be the same with that of the Justices of peace in their Sessions they may by force of this Act tender it to any Nobleman, or unmarried Noblewoman whatsoever above 18 years old, for the Justices of peace in their Sessions, by 3 *Jac.* 4. § 14. *N.* 2. may tender it there to any other person whatsoever: but, if it be meant of the power given the Justices of peace out of Sessions, 3 *Jac.* 4. § 13. *N.* 1. then the six privy Counsellours can tender it by force of this Act, 3 *Jac.* 4. § 41. *N.* 1. to such Noblemen or unmarryed Noblewomen only, who stand convicted or indicted of recusancy for not coming to Church, or who have not received the Sacrament twice within the year next before, or who passing through the Countrey unknown shall upon examination confess or deny their recusancy, or that they have not so received the Sacrament.

For the salving of which doubt it is to be considered, that the Bishop and not the Justices of Assize are here joyned with the Justices of peace, and these words 3 *Jac.* 4. § 41. *N.* 1 (*Where any Bishop or Justices of Peace* seem to bear this construction, *viz.*

either

either the one or the other indifferently may require the oath, and that can be intended only of the power given out of Seſſions, for in the Seſſions the Biſhop hath nothing to do.

But had the Juſtices of Aſſize been here added, *ſcil.* in all Caſes where the Biſhops Juſtices of Aſſize, or Juſtices of peace may require this oath, it had been clear that the power here 3 *Jac.* 4. § 41. *N.* 1. given the ſix privy Counſellours was as extenſive as that which 3 *Jac.* 4. § 14. *N.* 3. is given the Juſtices of Aſſize, or Juſtices of peace in their Seſſions, and they might have required the oath of any Nobleman or unmarried Noblewoman whatſoever of competent age. So if the Juſtices of Peace only had been here named, it had been clearly intended of the Juſtices of peace in either capacity, either in or out of Seſſions. But (*Biſhops*) 3 *Jac.* 4. § 41. *N.* 1. ſeems here to be a reſtrictive word, and to give the privy Counnſellours no more power, in reſpect of the Nobility, than the Biſhops had in reference to any other Subject.

2. Theſe words (*in all Cauſes where, &c.*) 3 *Jac.* 4. § 41. *N.* 1. ſeem to be reſtrictive likewiſe, and excluſive of ſome Cauſes; but the power of Juſtices of peace in Seſſions 3 *Jac.* 4. § 14. *N.* 3. extends to all Cauſes and perſons under the degree of Nobility whatſoever, which therefore can not be here intended 3 *Jac.* 4. § 41. *N.* 1. but only ſome particular Cauſes *ejuſdem generis*,

which can be no other than the Cauſes before-mentioned 3 *Jac.* 4. § 13. *N.* 1. wherein the Biſhops or two Juſtices out of Seſſions may deal, *ſcil.* where the party was before convicted or indicted, or had not received the Sacrament, or paſſed unknown, and confeſſed, *&c.*

And yet as it is reported 1 *Bulſtr.* 197. the Lord *Vaux* Ca. *Paſch.* 10. *Car.* 1. is to the contrary, for it is ſaid there, he was committed to the Fleet by the Privy Counſel for refuſing the oath of Allegeance, and afterwards indicted in *B. R.* of a *præmunire* for ſuch his refuſal, he being then of the age of 18 years, and above, and the ſaid oath being lawfully tendered, *&c.* All which was certified to the Court by divers of the Privy Counſel, upon which Indictment he was arraigned, and no word in the Indictment of his ſtanding convicted or indicted of Recuſancy, or not having received the Sacrament, *&c.* and yet the Indictment was grounded upon 3 *Jac.* 4. § 41. *N.* 1. and not upon 7 *Jac.* 6. § 26. *N.* 1. for by that ſtatute 7 *Jac.* 6. § 26. *N.* 5. he could not have been indicted of a *præmunire* for the firſt refuſal, but muſt have been committed, until the next Aſſizes or Seſſions, and if he had there refuſed it the ſecond time, he might have been indicted of a *præmunire* and not otherwiſe; but whether this Indictment were according to Law, or only paſſed *ſub ſilentio quære.*

Note, by 7 *Jac.* 6. § 26. *N.* 1. any privy Coun-

Counſellour, or the Biſhop of the Dioceſs may now require this oath of any Baron or Baroneſs of or above the age of 18 years, in all Caſes, and in ſome Caſes ſome privy Counſellours *Quorum unus. &c.* may require it of perſons above the ſaid degree.

CCXII. *Dignity.*

Page 198. *Noblewoman* 3 *Jac.* 4. § 41. *N.* 1. A Noblewoman who was ſuch by marriage only becomes a Widow, and takes to her ſecond husband a perſon under the degree of Nobility, by this her ſecond Marriage ſhe hath loſt her Nobility; and if ſhe again becomes a Widow, the oath ſhall not be tendred her by Privy Counſellours, but the Biſhop or two Juſtices of peace *Quorum unus, &c.* may by force of this Act 3 *Jac.* 4. § 41. *N.* 1. require her to take it, and upon her refuſal may proceed againſt her, as is above directed in the Caſe of a common perſon. *ſupra* *infra* 262.

CCXIII. *Days.*

Page 198. *then being above the age of* 18 *years*, 3 *Jac.* 4. § 41. *N.* 1. in this Caſe that day eighteen years, on which the party was born, muſt be wholly elapſed; for before this oath cannot be tendered, altho the hour of his birth be elapſed, for the Law rejects all fractions and diviſions of a Day, for the uncertainty which is always the mother of contention, 5 *Co.* 1. *Clayton's* Ca. 2 *Rolls* Abr. 521 *tit.* Temps.

CCXIV.

Page 198. *Præmunire* 3 *Jac.* 4. § 41. *N.* 2. in 1. *Bulſtr.* 197. the Court of *B. R.* denied the Lord *Vaux* Counſel, or trial by his Peers, and it was there held that the trial of

of a Nobleman by his Peers is at Common Law in 4 Cases only, *viz.* Treason, felony and misprision of both, but not to be allowed in the case of a *premunire*, for that in effect is no more than a contempt.

CCXV. *Cinque Ports*

Page 198, 199. If *the Warden of the Cinque Ports* do take such bond, and minister such oath, and do not certify them into the Exchequer, this seems to be *casus omissus*, and not provided for by the Act, 3 *Iac.* 4. § 42. *N.* 1. for he shall not be liable to the penalty inflicted by 3 *Iac.* 4. § 21. *N.* 2. on the Customer and Controller; for that, altho it be within the same mischief, there are no express words here, 3 *Iac.* 4. § 4. *N.* 1. to reach him, and penal statutes shall not be taken or construed by equity. *Lee* 77 *Yelvert.* 22 *Com.* 17. 86. *Kelway* 96. 2 *Roll* 420. & 1. *Inst.* 238.

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13 Jac. 5.

Of RECUSANTS.

CCXVI. *Days*

Page 201. *Within three Days next after the Offence committed*, 3 *Iac.* 5. § 1. *N.* 3. So that if three Days next after the Offence committed, elapse before the discovery is made, the discoverer shall have no benefit by this Act.

And

And therefore if the person discovering had no notice of the Offence, till the three Days expire, altho he discovers it presently upon such notice given him, yet he comes too late, much less shall he have three days after notice, as *Wingate Coron.* 128. mistakes.

Page 201. *commanding the said Sheriff or other Officer to pay the same*, 3. *Jac.* 5. § 1. *N.* 5. In the late Additions to *Dalton. Cap.* 81. *Sect.* 57. 't is said that the Sheriff is to grant his warrant for the payment of the discoverer, but that is a meer mis-recital for the Sheriff himself is to pay him. CCXVII. *Sheriffs.*

Page 203. In the late Additions to *Dalt. Cap.* 81. *Sect.* 45. this Clause 3 *Jac.* 5. § 3. *N.* 2. is otherwise recited, *viz.* that the Recusant, if he live within ten miles distance of *London*, is to deliver up his name to the Lord *Mayor* there, and 3 *Jac.* 5. § 4. *N.* 1. if he live above ten miles distant, then to the next Justice of peace: but the Statute is there mistaken in both points; for by 3 *Jac.* 5. § 3. *N.* 3. if the Recusant dwell within ten miles of *London*, and not in *London*, he is to deliver up his name to the next Justice of peace, and not to the Lord *Mayor*, and if he dwell above ten miles from *London* he is not within this Act, 3 *Jac.* 5. § 3. *N.* 4 nor bound by force thereof to deliver up his name at all. *Infra* 278. CCXVIII.

Page 203, 204. *This Proviso* 3 *Jac.* 5. § 5. *N.* 1. is by some taken to be in force at this day: But yet under favour as the *Proviso* CCXIX. *Lieu.*

viso is penned it seems to the contrary, and that now all Popish Recusants convicted or indicted of Recusancy, or not repairing to Church, but forbearing by the space of three months, are by this Act to depart *London*, and ten miles compass of the same, notwithstanding they are Trades-men, or have no other place of Dwelling.

For as to *Tradesmen* here, 3 *Jac.* 5. § 5. *N.* 1. are no other excepted than such as when this Act was made, used some Trade, mystery or manual ocupation: and as to both Tradesmen, and such as had or should have their only Dwelling in *London*, or ten miles compass, the Statute limits them to that place where they inhabited three months next before the Session of Parliament, wherein this Act was made, which cannot by any strained construction, extend to those in future times.

But the meaning of 3 *Jac.* 5. § 5. *N.* 1. seems to be, that Popish Recusants indicted or convicted of recusancy, or not repairing to Church, *&c.* who were then Tradesmen within *London* or ten miles compass, or such as then resided within *London* or ten miles compass, and should have no other place of abode, might continue there; so that they removed not to any other Dwelling than where they inhabited by the space of three months next before that Session of Parliament: or if they did, they were to lose the benefit of this *Proviso*, and must have removed above ten miles from *London*, as well as other

other Popish Recusants convicted or indicted, or not repairing to Church, as aforesaid.

And for those words (*such as shall have their onely Dwelling within the said City, &c.* 3 *Jac.* 5. § 5. *N.* 1. the future tense (*shall have*) doth not intend such Recusants as should have their Dwelling there, or within the ten miles compass after the making of this Act, and not before: but only such who having their Dwelling there before that Session of Parliament should at the time of their being indicted or convicted have their onely Dwelling there.

For if they had at such time of their being convicted or indicted two several houses, one within *London* or ten miles, and the other at a further distance, altho they inhabited in that which was within *London* or ten miles for three months next before that Session of Parliament, yet if they were not Tradesmen at the time of the making of this Act, 3 *Jac.* 5. § 5. *N.* 1. they should have had no benefit by this *Proviso*, but ought within ten days after such Indictment or Conviction for Recusancy, to have removed out of the compass of ten miles.

CCXX. *Licence.*

Page 205. *Giving Power to grant license or licenses unto the said Recusants*, by 35. *Eliz.* 2. § 12. *N.* 1. *in the Proviso* which is by 3 *Jac.* 5. § 6. *N.* 4. here repealed is only that which there impowers the Justices of peace, for that is the onely *Proviso* which gives power to grant licence, and the cause here

here alledged for the repeal, 3 *Jac.* 5. § 6. *N.* 2. is the giving of sundry Licences to recusants under colour of a *Proviso* in 35 *Eliz.* 2. which can be construed only of those, which were given by the Justices of peace, 35 *Eliz.* 2. § 12. *N.* 1. and not of the other Licenses given by 35 *Eliz.* 2. in several other Cases, so that the *Proviso's* there, 35 *Eliz.* 2. § 13 and 14. permitting the Popish recusant to travel in case of process, or commandment by privy Counsellours, or the Queens Commissioners or Proclamation to render his body to the Sheriffs, remain still in force and unrepealed, and the recusant may take the benefit thereof ae this day.

CCXXI. Page 207, 208. by (*such Recusant*) is intended here, 3 *Jac.* 5. § 7 *N.* 1. such Recusant as is confined by 35 *Eliz.* 2. § 3. *N.* 1 and § 4. *N.* 1. and not only such as were mentioned in 3 *Iac.* 5. § 6. *N.* 1 for that recital is imperfect, in that it mentions only the Popish recusant convict, 35 *Eliz.* 2. § 3. *N.* 1. whereas 35 *Eliz.* 2. § 4. *N.* 1. speaks as well of the Popish recusant not convicted, who hath no certain place of abode.

And the benefit of having Licenses from the King or three Privy Counsellours by force of this Act, 3 *Jac.* 5. § 7. *N.* 1. is intended as well to the one as the other, altho the convicted only are mentioned in the recital: And this will plainly appear 1. by the following words here, 3 *Iac.* 5. § 7. *N.* 2 which impower the Justices of peace to grant licences, and expressly extend to all now.

It

It cannot be presumed that the makers of the Law intended any difference between the persons to be licensed by the King or privy Counsellours, & the persons to be licensed by the Justices of peace, the power given 3 *Jac.* 5. § 7. *N.* 1. to the King or privy Counsellours being more absolute, and not under such præcautions, as is that which is given 3 *Jac.* 5. § 7. *N.* 3. to the Justices of peace: for the King or privy Counsellours may grant a license to the Recusant to travel without any particular Cause shewn in the license, or the assent of any other person and, without any oath to be made by the recusant, which the Justices of peace cannot do, and there is no reason to think that the power here given to the King or privy Counsellours, which in all other Particulars is so much more absolute and extensive than that given to the Justices of peace should be yet less extensive as to the persons to be licensed.

2. It were absurd to think, that the makers of 3 *Jac.* 5. § 7. *N.* 1. intended to confer a greater Priviledge upon the Recusant convicted, whose offence appears upon record, then to such as are not convicted, *&c.* But if by (*such Recusants*) should be meant only such as are mentioned in the recital 3 *Jac.* 5. § 6. *N.* 1. *viz.* those convicted, and not all who are confined by 35. *Eliz.* 2. § 3. *N.* 1. & § 4. *N.* 1. it would follow that the convicted recusant, who is the more notorious offender may have a licence without any cause shewn,

shewn, or oath made, but he who is not convicted, is barred of that priviledge, and can apply himself only to the Justices of peace for a licence clogged with divers circumstances which are not required in a licence granted by the King or the three privy Counsellours, 3 *Jac.* 5. § 7. *N.* 1.

Much less shall this recital, 3 *Jac.* 5. § 6. *N.* 1. of the Statute 35 *Eliz.* 2. § 3. *N.* 1. impeach the express words of that Statute, 35 *Eliz.* 2. § 4. *N.* 1. as if no other Popish Recusants were intended to be confined thereby, but only such as are convicted, because no other are mentioned in the recital, for the recital of an Act of Parliament in another Act of Parliament being only by way of Preface or Introduction, cannot add to or diminish the Act recited, or make it liable to any other construction than what shall naturally flow from the Act it self, 4 *Inst.* 331:

CCXXII. Page 208. *Without any other cause to be expressed*, 3 *Jac.* 5. § 7. *N.* 1. here is one difference between a licence by the King or three of the privy Counsel, and a licence by Justices of peace, for by these 3 *Jac.* 7. § 5. *N.* 2. it ought not to be granted, unless the Popish recusant hath necessary occasions or business; but the King's or privy Counsellours licence may be granted in any case at the Recusants request.

CCXXIII. Page 208 *Under the Hands and Seals*, 3 *Jac.* 5. § 7. *N.* 2. An Indictment was brought upon 35 *Eliz.* 2. § 3. *N.* 1. for tra-

travelling out of the compass of five miles the recusant pleaded a license under the Seals of four Justices of peace, and exception was taken to the plea; for that the license ought to have been under their hands as well as their seals, 2 *Cr.* 352. *Mich.* 12. *Jac. Maxfield Case.* And this is a good exception for a license by Justices of peace, altho in writing 'tis not sufficient without Seals and subscription both, 1 *Roll* 108 *Pl.* 47, *Muecle-fields Ca.*

CCXXIV. *Recusants.*

Of four of the Justices of Peace 3 *Jac.* 5. § 7. *N.* 2. and a license from less than four will not now serve, since the repeal of 35 *Eliz.* 2. § 12. *N.* 1. and therefore 1 *Roll* 108 is misreported in that particular; for there mention is made of a license from two Justices of peace, as if no more were then requisite, and that Case could not be grounded upon the *Proviso* in 35 *Eliz.* 2. § 12. *N.* 1. which required only two Justices as well for the distance of time (being nine years) after the repeal of that *Proviso* by 3 *Jac.* 5. § 6. *N.* 4.) As for that in *Roll* 108 there is mention of a licence under the Seals of the Justices of Peace, and of the oath to be taken by the recusant, neither of which was appointed by 35 *Eliz.* 2. § 12. *N.* 1. but by this *Statute* 3 *Jac.* 5. § 7. *N.* 4. which must therefore necessarily be there intended, and

CCXXV.

Page 208, 209. *With the privity and assent in writing of the Bishop, &c. the Lieutenant, or of any Deputy Lieutenant,* 3 *Jac.* 5. § 7. *N.* 2. An information was brought against

a Popish recusant convict for removing above five miles from the place of his confinement, who pleaded a licence from four Justices of peace, but the plea was disallowed *Mich.* 12 *Jac. Moor* 836. *Pl.* 1127. *Mansfields* Ca. But yet if it had been granted with the assent of any Deputy Lieutenant residing in the County, there is no doubt but it had been good enough.

The Bishop, Lieutenant, or Deputy Lieutenant who gives his assent, must be a distinct person from the Justices of peace, who grant the licence by 3 *Jac.* 5. § 7 *N.* 2. and therefore if one and the same person be a Justice of peace and Deputy Lieutenant, he can not act herein in both capaciteis, for *una persona non potest supplere vicem duorum*, and if he sign and seal the licence as a Justice of peace, the assent of some other Deputy Lieutenant, or of the Bishop, or Lieutenant must be had thereto, or the licence is void, *Mich.* 12. *Jac. Maxfield's* Ca. 2 *Cr.* 352. and *Mansfield's* Ca. *Moor* 836. *Pl.* 1127. and *Mucclesfield's* Ca 1 *Roll* 108. and that Rule *Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis* holds not in such Cases where distinct persons are necessarily required by Law, 7 *Co.* 14. *Calvin's* Ca. and here four persons 3 *Jac.* 5. § 7 *N.* 2. are necessarily required to grant the licence, and another person to assent to it.

In 2 *Cr.* 352. one exception to the licenſe in *Maxfield's* Ca. was that the assent of the Deputy Lieutenant was contained in the

the license granted by the four Justices of peace, and was not separate and distinct by it self; But to this the Court made no answer, and it seems that such an assent is well enough by 3 *Jac.* 5. § 7. *N.* 2. tho in the same writing with the license, if it be expressed that the four do license, and the Deputy Lieutenant doth assent, and such writing be under the Hands and Seals of all five.

Page 209, 210. *residing within the said county or liberty*, 3 *Jac.* 5. § 7. *N.* 2. these words seem to refer as wel to the Bishop & Lieutenant as to the Deputy Lieutenant; so that if a Bishop's Diocess extends into divers Counties, and he resides in one of them, his assent can be good only for the Popish recusants of that County where he resides, and not for those of any other part of this Diocess.

So if a Lieutenant resides out of the County whereof he is Lieutenant, his assent to such license is void, and that these words (*Residing within the County or Liberty*) 3 *Jac.* 5. § 7. *N.* 2. cannot be restrained to the Deputy Lieutenant only, appears by those next before-going (*viz.* of the same County) which clearly relate to the Lieutenant as well as to the Deputy Lieutenant, and by consequence so must the word immediately subsequent (*viz.* Residing) and as to the Bishop, the inconvenience is the same as in the Case of the Lieutenant, 3 *Jac.* 5. § 7. *N.* 2. for by their remoteness they are disabled to judge of the condition and behaviour

CCXXVI. *Licence.*

our of the Recusant to be licensed, and of the circumstances wherein he stands, and whether such license may be granted to him without hazard of the publick safety, which seems to be the reason of this restriction to the County or Liberty where the party who is to assent, resides, and holds as well the case of the Bishop or Lieutenant as of any Deputy Lieutenant residing out of the County.

CCXXVIII **Page** 210. *The particular Cause of the said License*, 3 *Jac.* 5. § 7. *N.* 3. in *Maxfield's* Ca. 2 *Cr.* 352, another exception to the license granted by the four Justices, was, that it was said to be granted for certain urgent causes; but no particular cause for the recusants travel was expressed in the license; and this seems to be a good exception for the inserting into the License that the Popish recusant hath urgent or necessary occasion, or business, answers only the former part of this *Proviso*, 3 *Jac.* 5. § 7. *N.* 2. which gives the former Justices power to license him, if he hath necessary occasion or business to travel out of the compass of five miles, but withall, it ought to be mentioned in the license, particularly what that occasion or business is which is the cause of the License, for so this Act here, 3 *Jac.* 5. § 7. *N.* 3. expressly appoints, and therefore that form of a License for a recusant to travel, which *Dalton* 379 *Cap.* 124. *tit.* licenses, hath set down, wherein no cause is mentioned, but urgent and necessary business seems

seems too short and general and is not to be relyed on.

CCXXVIII **Page** 210, *First taking his Corporal oath* 3 *Jac.* 5. §7. *N.* 4. in *Mansfiel.* ca. *Moor* 836. *pl.* 1127. there is another oath mentioned for a *Popish recusant* to take before he can be licensed to travel, and that is the *oath* of *Allegiance* prescribed by 3 *Jac.* 4. § 25. *N.* 1. for in *Moor* 836. it's said that in an Information brought against the recusant for travelling out of the compass of five miles, the defendant pleaded a licence from four Justices of peace, and his plea was disallowed, because (among other things) that did not shew that before the licence he had taken the oath of Allegiance, yet *Quære* of this and by what Law the omitting to take that Oath makes the Licence void, but I rather think it to be a mistake, and that such an exception might be moved, but the plea not disallowed for that reason.

Page 210, 211. *Before the said four Justices of the Peace or any of them*, 3 *Jac.* 5. §7. *N.* 4. Master *Shepherd* in Sure Guide, *Cap.* 14. *Sect.* 5. thinks that no less than two of the four Justices of the peace can minister this Oath to the recusant. But I take it to be there that any one of the four Justices may minister the Oath in this Case.

And there is a great difference between (any Justices) for that denotes the Plural number, as in the subsequent clause, 3 *Jac.* 5. § 27. *N.* 1. where any Justices may imprison the Offender, that is any two Justi-

ces or more, and (Any of the Justices) are here 3 *Jac.* 5 § 7. *N.* 4. which denotes the singular number; and the following words (who shall have Authority by vertue of this Act to minister the same) may be well enough applied to any one Justice of peace.

CCXXX. **Page** 211. *That he hath truly informed them of the Cause of his journey*, 3 *Jac.* 5. § 7 *N.* 4. If an information be brought against a Popish recusant for travelling out of his compass of five miles, and he plead a licence from four Justices of peace, it seems necessary that he averr in his plea that the cause contained in his licence was true and real, *Moor* 836. *pl.* 1127.

CCXXXI. *Ability.* **Page** 212. This clause 3 *Jac.* 5. § 8. *N.* 9. extends not to all sorts of recusants who are convicted, or have Wives, who are recusants convicted, as is mistaken in the Additions to *Dalton*, Cap. 81. Sect. 46. tit. *Recusants*, but at this day only to the Popish recusant convicted or having a Wife who is a Popish recusant convicted.

A Popish recusant not convicted hath a Wife who is convicted of recusancy, but is no Popish recusant, the Husband is not disabled by 3 *Jac.* 5. § 9. *N.* 1. to exercise any publick Office or Charge; for that neither the Husband is a convicted recusant, nor the Wife a Popish recusant.

A person who is convicted of recusancy, but is no Popish recusant, hath a Wife who is a Popish recusant, but not convicted, the Hus-

Husband is out of this branch of the Statute 3 *Iac.* 5. § 9. *N.* 1. for that neither the Husband is a Popish recusant, nor the Wife convicted.

Page 213, 214, 215. *The Issues and Profits of two parts of her Dower*, 3 Iac. 5. § 10. *N.* 1. and not of two parts of her Joynture or Dower, as *Wingate Coron.* 134 For there are divers Cases, where, notwithstanding 27. *H.* 8. 10. § 6 *N.* 3. the Wife shall have her Dower and Joynture both, and if she offend against 3 *Iac.* 5. § 10. *N.* 1. she shall forfeit the profits of two parts of both; and that not only where the Joynture made to her is not warranted by 27 *H.* 8. 10. § 6. *N.* 1 But in some Cases where the Joynture is pursuant and according to the Statute, she shall have her Dower and Joynture both. CCXXXII. *Women.*

If an Estate be made of Lands to the wife for the Life of another, 4 *Co.* 3: *Vernons* Case. *Dower.*

Or for a thousand years, if she lives so long, 1 *Inst.* 36.

Or if a Rent be granted to the Wife for the life of another, or for years, or any other way not pursuant to 27. *H.* 8. 10. § 6. *N.* 1. *Bickley's* Ca. 1. *Anderson* 288. *pl.* 296. and 2 *Anderson* 30 *pl.* 2. *Wentworth's* Case.

Or if an Estate be made to others in Fee, or for the Wives life upon trust for her benefit, 1 *Inst.* 36.

Or if a man covenant to stand seised to the use of himself in Tayl, the Rem. to the use

of his Wife for life *Pasch* 16. *Jac.* B. R. *Wood's* Ca.

Or if the Husband make a Feoffment in Fee to the use of himself for life, the Remainder to another for life or years, the remainder to the Wife for her life, 4 *Co* 2. *Hutt.* 51. *Shrewell's* Ca.

In all these Cases altho the Lands or rent were conveyed to the Wife for her Joynture, yet the Estate not being within 27 *H.* 8. 10. § 6. *N.* 1. her acceptance thereof shall not barre her Dower, but she shall have such Joynture and her Dower also.

And the reason why in the two last Cases the Wife shall not be barred of her Dower, altho there be an Estate limited to her for her life, is, because the Estate is not in its first Creation appoynted to take immediatly after the death of the Husband, and no matter which ariseth *ex post facto*, can salve this, or make it a Joynture within 27 *H.* 8. 10. § 6. *N.* 3. to barre her Dower.

And therefore if in *Wood's* Ca. the Husband Tenant in Tayl dyeth without issue, or if in *Hutt.* 51. he in remainder dye before the Husband, or the term for years determine in the Husband's life-time, so that the Wife may enter presently after his death, yet because the Estate to the wife for her life was not originally limited to take immediately after his death, it shall not barre her Dower *quod ab initio non valet &c.*

And as in all the Cases before-mentioned

if

if the Estate were made for her Joynture, the Wife shall have such Joynture and Dower, both (so if she be an Offender within 3 *Jac.* 5. § 10. *N.* 1. and conform not within the year next before her Husband's death,) she shall forfeit the profits of two parts of both.

But otherwise it is where an Estate is given or limited by the Husband to the Wife, and it's neither expressed nor can be averred and proved to be given, or limited for her Joynture, or in recompense of her Dower, and therefore if any of the Estates before-mentioned, which are not within 27 *H.* 8. 10, § 6. *N.* 1. be granted or limited to the Wife by the Husband, or any other Estate for her life, or otherwise which would be a good Joynture within the said Statute, if it were intended for a Joynture, as if a man before or after Marriage covenants to stand seised of Lands to the use of himself for life, the remainder to his Wife for her life, and it is neither expressed in the deed, nor can be averred and proved that it was for her Joynture; Or if a man devise Lands by his last Will to his Wife generally, and there is no mention in the Will that 'tis for her Joynture (for in this Case an Averment that it was so intended will not serve, unless there be express words in the will to that purpose, These Estates so gained by the Wife, as they do not barre her Dower out of the Residue of her Husband's Estate, but that she shall

enjoy

enjoy both the one and the other, 4 *Co.* 4. So they are not within the meaning of this Act 3 *Jac.* 5. § 10. *N.* 1. because not made for her Joynture, and she shall not forfeit the Profits of two parts of them, altho she may forfeit the Profits of two parts of her Dower, which she hath out of the residue of her Husband's Estate.

If Lands be conveyed to the Wife before Marriage for part of her Joynture, and other Lands are conveyed to her after Marriage, in full satisfaction of her Joynture, and she refuse those conveyed after Marriage, in this Case she may retain those conveyed before Marriage, and yet be endowed of the residue of her Husband's Estate, for that the Lands first settled on her were not for her whole Joynture, 1 *Inst.* 35. and 4 *Co.* 3.

And if she be a Popish recusant convict, and her Husband none, and she conform not within the year next before his Death, she shall forfeit the Profits of two parts both of such Dower and of the Estate so conveyed to her before her Marriage.

And as the Wife shall have her Joynture and Dower both in such Cases where the Joynture is not pursuant to 27 *H.* 8. 10. § 6. *N.* 1. So in some Cases likewise where she hath a Joynture pursuant to that Statute, as where she hath such a Joynture made to her by the Husband before Marriage; and he afterwards endow her *ad ostium Ecclesiæ*, or if she hath a Joynture made by the Husband in his life-time: and after his

his death, his Heir or Feoffee assigne other Lands to her in Dower, or the Heir plead to her in a Writt of Dower *ne unques seisie que Dower, &c.* or *nient accouple* in Loyal Matrimony or any other plea (save Joynture) in Barre of Dower, and it be found against him in these Cases, the Wife shall hold her Joynture, and yet be endowed; and if she be an Offender within 3 *Jac.* 5. § 10. *N.* 1. shall forfeit the profits of two parts of her Joynture and Dower both.

But if a Widow, who is endowed of the Lands of her deceased Husband, takes a second Husband who is no Popish Recusant convicted, by whom she hath a Joynture, and she becomes a Popish Recusant convict, and the second Husband dyeth, and the Wife is Offender within 3 *Jac.* 5. § 10. *N.* 1. In this Case she shall not by force thereof forfeit the profits of two parts of such Dower and Joynture both: but only of her Joynture, for that her Dower is not out of the Lands of her said Husband, that is, of the Husband in whose life-time she stood convicted, and after such conviction forbore to conform, *&c.* within the year next before his death.

CCXXXIII. *Judgment.*

Page 216. *Convicted of Popish Recusancy* 3 *Jac.* 5. § 11: *N.* 1. The conviction mentioned here and in the other Branches of this Statute, seems to be intended not only of a Conviction according to 26 *Eliz.* 6: § 5. *N.* 5. or 3 *Jac.* 4. § 7. *N.* 2. upon Proclamation and default of appearance, but of a judgment likewise upon an Indictment or popu-

popular suit on 23 *Eliz.* 1. § 5. *N.* 1. and 11. *N.* 1. for Conviction in relation to these three last mentioned Remedies is to be taken for adjudged or attainted *supra* 63. *N.* 2. and the Popish Recusant who is either convicted upon proclamation and default of appearance or against whom Judgment is had upon an Indictment, popular suit or action of debt, *&c.* at the King's suit is hereby disabled as an excommunicate person and liable to all other the penalties and incapacities inflicted by this Act 3 *Jac.* 5. on a Popish Recusant convicted.

CCXXXIV. *Excomgent.* **Page** 216 *Reputed to all intents and purposes disabled as a person, &c. excommunicate*, 3 *Jac.* 5. § 11. *N.* 1. and not reputed to all intents as an excommunicate person, as *Wingate Coron* 135 mis-recites: for as it seems by the words of the Statute the Popish Recusant convicted is not to be reputed as a person excommunicate in any other respect, or to any other intent but as to his Disability only *infra* 243. and yet 2 *Bulstr.* 145. 155: the opinion of the Court in *B. R. Mich.* 11. *Jac. Griffith*'s Ca. seems to be to the contrary, that a Popish Recusant convicted may by force of 3 *Jac.* 5. § 11. *N.* 1. be attached upon a Writ *de excommunicato capiendo*: *Tamen quere* whether this statute being a penal Law and speaking only of the point of disability shall be extended by equity to other Cases, or the Recusant be attached upon an *excommunicato capiendo*, unless he be first actually excommunicated.

A Po-

A Popish Recusant convict is disabled as an excommunicate person to be a witness in any Cause between Party and Party by *Coke Ch. Inst.* 2 *Bulstr.* 155.

CCXXXV. Page 216, 217, 218. *May plead the same in disabling of such Plaintiff* 3 *Jac.* 5. § 11 *N.* 2. this disability in the Popish Recusant convicted, is but *Quousque, &c.* untill he conform, *&c.* and take the Oath of Allegeance, and the Defendant must in this Case plead the Conviction at large, and must as in a plea of Excommengement demand if the plaintiff shall be answered, *Hetley* 18. which is the Legal Conclusion of a Plea in disability of the person.

The Defendant in debt upon an Obligation pleads that the Plaintiff is a Popish Recusant convict, who replyeth *nul tiel* record such plea in disability of the person is peremptory and *nul tiel record* is an issue and judgment shall be given against the Defendant upon failer of the Record, *Hetley* 18.

Certiorari. But yet if there be a Plea of a Conviction of Recusancy had before the Justices of Gaol delivery, and the Defendant mistakes, and takes out a *Certiorari* to the Justices of Peace, this shall not be a failer of the Record, altho the Defendant hath it not at the day; for that the issuing of a *Certiorari* was the Award of the Court: but a *Certiorari* shall be awarded *de novo* to the Justices of Gaol delivery before whom the Plaintiff was convicted, *Hob.* 135. *Pye* and *Thrill.*

Note:

Note: If the Defendant be sued in *C. B.* or any other of the Principal Courts at *Westminster*, and he plead a Conviction of Recusancy before the Justices of Gaol delivery, or Justices of Peace, he need not take his *Certiorari* out of the Chancery, and so bring it by *Mittimus*; but the Court may send a *Certiorari* immediately to that inferiour Court where the Plaintiff was convicted, as was held *Hob.* 135. See 19 *H.* 6. 19.

And the Justices themselves before whom the Conviction was had, must certify; and therefore if the Conviction was had before Justices of peace, the Certificate cannot be by the *Custos Rotulorum* alone, though he keep the Records, for the *Certiorari* is in such Case directed to the Justices of peace, *Hob* 135.

A Popish Recusant is convicted of recusancy in a popular suit, and after such Conviction sues the Informer *qui tam*, &c. upon some other matter or cause of action arising between them. *Quære* whether the Defendant may plead such Conviction in disability of the Recusant, by 3 *Jac.* 5. § 11. *N.* 2. for this Conviction disables the Recusant to sue as if he were excommunicated, and no otherwise.

Now if a Bishop excommunicate any one, and the Bishop be afterwards sued at Law for any other matter or cause by the person so excommunicated, the Bishop cannot plead this Excommunication in disability of the plaintiff who sueth 1 *Inst.* 134. *Swinborn*

born 303. *part.* 5. *fol.* 6. and the reason given for this 8 *Co.* 68. in *Trollop's* Case is, because the Bishop was a party to the Excommunication, and therefore shall take no advantage by it.

Which reason seems to hold likewise in the case of an Informer *Qui tam, &c.* who is a party to the Conviction of the Recusant upon the popular suit; which conviction renders the Recusant disabled to all intents as an excommunicate person; and therefore he being a party to it, by the same Rule shall not take advantage of it in disability of the Recusant in any action brought by the Recusant against him.

But yet notwithstanding I conceive the Informer *qui tam, &c.* at whose suit the Recusant was convicted, may well take advantage of this Conviction, and plead it in disability of the person of the Recusent, and that the true reason why the Bishop shall not be admitted to plead an Excommunication pronounced by him in disability, *&c.* is not because he is a party to the Excommencement; but because in matters of Excommunication the Bishop acts as judge, and 'tis by his Sentence and Authority that the party is excommunicated, and he shall not take advantage in another suit of a sentence given by himself judicially; and this will not hold in the case of an Informer, *&c.*

14. *H.* 4. 14.

If an Executor or Administrator becomes a Popish recusant convict, it seems he is dis-

disabled by this Act, 3 *Jac.* 5. § 1. *N.* 1. to sue in either of these capacities, for 3 *Jac.* 5 § 11. *N.* 1. saith he shall be disabled to all intents as an excommunicate person. Now a person actually excommunicated can not sue as Executor or Administrator, as is held 21 *Ed.* 4. 49. 21 *H.* 6. 30. and 14. *H.* 6. 15. and 1 *Inst.* 134. altho there are some opinions to the contrary, *Finch.* 27.

CCXXXVI. Page 219, 220. *Which are not to be seized or taken into the King's hands, &c.* 3 *Jac.* 5. § 12. *N.* 1. these words are not restrained to such Lands, *&c.* as cannot be seized into the King's hands for recusancy, for then the Recusant could in no case sue for more than the third part, for that the King may, if he please, make his Election, and seize the other two parts in lieu of the XX. *lib* per Month: But they are intended of all Lands, *&c.* of the recusant, which neither the King hath seized, nor are by Law to be seized by vertue of any thing which the King hath already done, or in respect of what the recusant after his conviction hath omitted to do.

And therefore if a man be convicted of recusancy upon a popular suit, or an action of debt at the King's suit alone (in which cases the penalty of XX. *lib.* per Month is not appropriated to the King for the time to come;) and he payeth the penalty recovered; or if he be convicted upon Indictment, and after such Conviction duly payes the XX. *lib.* per Month into the Exchequer,

and

and the King makes no Election to take the two third parts of his Eſtate in lieu thereof ſuch Recuſant may by this *Proviſo* 3 *Jac.* 5. § 12. *N.* 1. in either of thoſe Caſes ſue or proſecute for any of his Lands, Tenements, Leaſes, Rents, Annuitys or Hereditaments whatſoever notwithſtanding his conviction: for when the penalty recovered is ſatisfied or the forfeiture appropriated to the King is duely paid into the Exchequer his lands, *&c.* are not to be ſeized by force of any Law for recuſancy, unleſs the King make his Election to have the two parts, and untill that Election they cannot in the ſenſe of this *Proviſo*, 3 *Jac.* 5. § 12. *N.* 1. be ſaid to be Lands to be ſeized or taken into the King's hands, for that the King cannot have the two parts, and the XX. *lib.* per Month both.

But if the King make no ſuch Election and the XX. *lib.* per Month be duely paid into the Exchequer, the Recuſant is to hold and enjoy all his Lands, Tenements, *&c.* as if he had never been convicted: and during that time there can be no diſtinction made between the two parts and the Recuſants third part: ſo that in this Caſe the recuſant muſt either be enabled to ſue and proſecute for all his Lands, *&c.* or none, and and to think the latter of theſe were to render this *Proviſo* 3 *Jac.* 5. § 12. *N.* 1. nugatory and vain: But when once the King hath ſeized the two Thirds for Recuſancy either by way of Election or for non-pay-

ment of the XX. *lib.* per Month penalty then the Recusant is enabled to sue only for the other Third part whether in the hands of the King or of a common person.

CCXXXVII. *Marriage:* Page 220, 221. *Every man, being, or which shall be a Popish Recusant convicted*, 3 *Jac.* 5 § 13. *N.* 2. A man who is no Popish recusant convicted, marrieth a Woman who is a Popish recusant convicted in other form than is here appointed, he shall not forfeit any thing, or be disabled by this Act, *infra* 239.

CCXXXVIII. Page 221. *by a Minister lawfully authorized*, 3 *Jac.* 5. § 13. *N.* 2. in an Information upon this Statute for being married otherwise than is here appointed, it is sufficient for the Defendant to say that he was married, &c. by a Minister lawfully authorized without shewing in particular, how, or where or when; but if a Traveller come of the other side, then the Defendant is in his rejoynder to shew the time and place,

CCXXXIX. 2 *Bulstr.* 50, 52. *Creswick* against *Rookesby*.

Every Woman being or which shall be a Popish Recusant convicted, 3 *Jac.* 5. § 13. *N.* 3. A Woman who is no Popish recusant convicted, marrieth a Man who is a Popish recusant convicted in other form than is here appointed, she shall not be disabled by this branch of the Act, for the forfeiture or disability extends only to the Popish recusant convicted, and as in the Case before cited *supra* 227. the Woman only shall be disabled, so in this case the man only shall forfeit, or be disabled.

Page

CCXL.

Page 222. *Or any Joynture of the Lands and Hereditaments of her Husband or any of his Ancestors*, 3 *Jac.* 5. § 13. *N.* 3. A Feme who is a Popish recusant convicted, and married otherwise than is appointed by this Act, is not therefore disabled to have any sort of Joynture, as *Wingate Coron* 136. mistakes but only such Joynture as is of the Lands or Hereditaments of her Husband, or some of his Ancestors.

And therefore, if in consideration of some service done, or for some other consideration, and for the Advancement of *A* in marriage, Lands are settled upon his intended Wife for her Joynture by some person besides *A* who is not any of the Ancestors of *A*, such Joynture is not within this Act of 3 *Jac.* 5. § 13. *N.* 3. nor shall the Wife (altho a Popish recusant convicted and married otherwise) &c. be disabled by any strained construction of this Law to enjoy the Lands after her Husband's death.

For a penal Law shall be taken strictly, and not by Equity or Intendment; especially where the intent of the Law-makers doth not appear to the contrary, and the Case such as doth but rarely happen: and it is a good Rule in the construction of Statute-Laws, *Vaughan* 373. that when the words of a Law extend not to an inconvenience rarely happening, and do to those which often happen; it is good reason not to strain the words further than they reach, but to say it is *Casus omissus* and that the Law

intended *Ea, quæ frequentius accidunt.*

And yet there is no question but such Lands are a Joynture, and if made with the Wives assent before Marriage, shall barre her Dower by 27 *H.* 8. 10. § 6. *N.* 1. which speaks of one Estate or Purchase made to the Wife for her Joynture generally, not saying by whom, described by *Shepherds* Epitome.

CCXLI. **Page** 222. *By vertue of any Custom of any County, City or Place*, 3 *Jac.* 5. § 13. *N.* 3. and not of Citys only, as 'tis restrained in the late Additions *Dalton* Cap. 85. Sect. 48.

The custom here mentioned 3 *Jac.* 5. § 13 *N.* 3. *viz.*, that the Wife shall have a certain portion of her Husband's Goods after his decease is of force throughout the whole Province of *Yorke* and in divers other places of *England*, and if he gives them away from her by his will the bequest is void, *Swinborn* 1551, 152. part. 3. cap. 14. 9. *H.* 3. 18. § *N.*

A Woman is an Offender within this Branch, 3 *Jac.* 5. § 13. *N.* 3. and her Husband by his last Will gives her all or part of his Goods not claimable by Custom, she is not by this Act disabled to enjoy them after his Death, for the words here are plainly restrictive to such Goods as she claims by Custom.

CCXLII. **Page** 222. *Whereof he may be entituled to be Tenant by the courtesy*, 3 *Jac.* 5. § 13. *N.* 4. A Popish recusant convicted marrieth an Inheretrix in other form than is appointed by this Act the Wife dyes without issue born

born alive of the Marriage; in this Case, altho the Husband is not intituled to be Tenant by the Courtesy, yet the possibility, which he once had to be so entituled, seems to satisfy the intent of this Act, and he shall not forfeit the C. *li.*

So that here is another *Casus omissus*, for it may so happen that a Popish recusant convict may have a great portion with his Wife and but a small Estate in Lands with her, perchance but a few Acres, yet if he be an Offender within this Branch, 3 *Jac.* 5. § 13. *N.* 4. the Lands for that he may be entitled to be Tenant by the Courtesy by them shall save his C *li.* And if his Wife dye having had no issue born alive, he is wholly exempted out of the Act and cannot be punished either way.

Page 223. The Exception here, 3 *Jac.* 5. § 15. *N.* 1. of *Popish Recusant excommunicate* is intended only of one actually excommunicated, and not of him who is a Popish recusant convict, who shall not be reputed as a person excommunicate to this intent, but only as to the point of Disability as *supra* 234. So that if any Popish Recusant not actually excommunicate be buried elsewhere or otherwise than is here mentioned, altho he were convicted, yet 'tis an Offence punishable by this Law, 3 *Jac.* 5. § 5. *N.* 1. CCXLIII.

Page 224, 225. *The next of kin or her Kin*, 3 *Jac.* 5. 16. *N.* 2. It hath been a great Question formerly Whether the Mother can CCXLVI

be said to be of kin to the child, and it hath been held in the Negative as well by the common Lawyers as Civilians, as appears by the Duke of *Suffolks* Case 5. *Ed.* 6. Administrators *Br.* 47. and that of *Brown* and *Skelton.*

But the Law is now held to be otherwise (*viz*) that the Mother shall be taken to be of kin to the child, and that in a nearer degree than is the Brother or Sister, and that shall be preferred in the case of an administrator upon 21: *H.* 8. 5. § 3 *N.* 6. and of guardianship by the Statute of *Marlbridg* 52. *H.* 3. 7. where a man dyeth seis'd of Lands holden in soccage. Which later opinion agreeth with *Lit.* 1. that the Parent is nearer of blood to the child than the Uncle, See 1 *Inst.* 88. and in *Ratcliff's* Ca. 3 *Co.* 40. the Duke of *Suffolk's* Case is denyed to be Law; so that if any child be sent or go beyond the Seas contrary to this Act, his Mother by 3 *Jac.* 3. § 6. *N.* 2. shall be preferred before his Brother or Sister, and as next of kin may have and enjoy his Lands, *&c.* unless she be a Popish Recusant.

For next of Kin, or next of Blood shall not 3 *Jac.* 5. § 9. *N.* 2. be accounted here by course of deicent, but as in the case of Purchase where a Remainder is limited to the next of Blood or Kin.

And therefore if a man hath issue three sons *A. B.* and *C.* and dyeth, *A* and *B* have issue, each of them a son, and dye; the son of *B.* goeth beyond the Seas contrary to this Act,

Act, in this Case *C*, the youngest Uncle shall by force of this Act 5 *Jac.* 5 § 16. *N.* 2. have and enjoy the Lands of the Offender, untill his conformity, and not the son of *A* the elder Uncle; for that *C* hath in him *jus propinquitatis*, as being the Uncle, and so nearer of Kin than the Cousin German, and yet the son of *A* is heir at Law *jure representationis* as being the son of the eldest Brother, 1 *Inst.* 10. *Palmer* 304, 305. *Pervian* and *Pierce*.

CCXLV. *Forfeiture.*

Page 225, 226. *Shall have and enjoy the said Lands, &c.* 3 *Jac.* 5. § 16. *N.* 2. It was held by *Mountague* and *Hobert Ch. J. Pasch* 15. *Jac. Lee* 59 in *Tredwayes* Case, that if a person goeth beyond the Seas, contrary to this Act, yet the state of the Land is not forfeited nor settled in the next of Kin, but rests in the Heir himself who is the offender; for the Statute 3 *Jac.* 5. § 16. *N.* 1. saith not that he shall not take by descent but only that he shall take no benefit by descent, and that therefore this Statute differs from 6 *Rich.* 2. 6, § 1. *N.* 3. of consenting to ravishment. And 11 *H.* 7. 20. § 1. *N.* 2. of Discontinuance by Women.

And *Hobard* said *Lee* 59. that if the Heir beyond Sea bargain and sell the Land descended to him, he shall prevent the next of Kin, if he hath not entred; and if he hath entred, the Land shall be taken from him *Quære* of this for *Tanfield* chief Baron seemed to be of contrary opinion in the main point, and held that the State of the Land is settled by 3 *Jac.* 5. § 16. *N.* 2. in the next of Kin.

Note: In *Lee* 59. it's said to be the meaning of this Act, 3 *Jac.* 5. § 16. *N.* 2. that the profits of the Land should be received by the next of Kin during the Offenders non-conformity: but these words (*Have* and *Enjoy*) seem to imply somewhat more, and that the next of Kin shall have the Land it self.

CCXLVI. *Presentant.* Page 226. *From and after the end of this present Session of Parliament*, 3 *Jac.* 5. § 18. *N.* 1. A man seised of an Advowson grants the next Avoydance, and then becomes a Popish Recusant convict, the grant of the next Avoydance is void, and the University shall present: for the foregoing words (*During his Recusancy*) do not import the time when his disability shall begin, but when it shall end, *viz.* when he remains no longer a Recusant.

But when once he becomes a Popish Recusant convict, his disability shall have relation to all the time going before, *viz.* from the end of that Session of Parliament, wherein this Act was made 10 *Co.* 55, 56. the Chancellor of *Oxford's* Case and *Jones* 20. *Standens* Case, *&c.* and such retrospects are usual in Acts of Parliament.

And yet after the grant of the next Avoydance the Patron or Grantor becomes a Popish Recusant by Covin convict, and to the intent to make void such his Grant; this shall not defeat the Interest of the Grantor, but he may present when the Church becomes void, notwithstanding such Conviction, *Jones* 20. But

But then the Covin must be averred by the Grantee, and found by the Jury to be to that particular intent, as *infra* 250. *N.* 4.

Page 228, 229. *Be utterly disabled to present to any Benefice, &c.* 3 *Jac.* 5. § 18. *N.* 1. A man hath the right of Nomination to a benefice which is presentative, and another hath the Right of Presentation, if he who hath the right of Nomination become a Popish Recusant convict, I conceive he is disabled by this Act to nominate. CCXLVII.

For altho only the word [*Presens*] be here used as to a Benefice or Ecclesiastical Living presentative, yet this shall extend as wel to Nomination; for the intent of the Act, 3 *Jac.* 5. § 18. *N.* 1. is to prevent a Recusant from appointing who shall be incumbent, and the Case of Nomination is in equal mischief with that of the Presentant, and if the Recusant should not be disabled to nominate as wel as to present the intent of the Act, 3 *Jac.* 5. § 18. *N.* 1. would be eluded; for he, that hath the right of Nomination, is in effect the Patron; and he, that presents at the Nomination of another, is but as a Messenger between him and the Ordinary, 14 *H.* 4. 11.

And if he, who is to present, presents any other than the person nominated to him, or doth not present the person nominated, he, who nominats, may bring a second Impediment against him.

And he, who hath the Nomination, must jointly

jointly with him who hath the preſentation, confirm the Leaſe of the Incumbent, *Moor* 49 *Pl.* 147. *F. N. B.* 33. It is true the general Rule is that penal Statutes ſhall not be taken by Equity: from whence may be inferred that 3 *Jac.* 5. § 18. *N.* 1. only diſabling a Recuſant to preſent to a Benefice preſentative ſhall not be extended to diſable him to Nominate, altho it be within the ſame Miſchief: But that Rule hath ſome Exceptions: and where the intent of the makers of the Law plainly appears by other words, in the ſame Statute a penal Statute ſhall be expounded largely and according to that Intent beyond the Letter, as in caſe of Symony on 3 *Eliz.* 6. § *N. Hob.* 75.

Now in the ſubſequent Clauſe 3 *Jac.* 5. § 19. *N.* 1. touching the Univerſity, the Nomination as well as Preſentation is given to them, and conſequently the Recuſant was intended to be diſabled in the one Caſe as well as in the other.

Beſides the words [*Diſabled to preſent*] 3 *Jac.* 5. § 18. *N.* 1. may be aptly enough expounded, *diſabled to nominate*, for the Preſentment is truly and really in him who hath the right of Nomination, as is held in 14 *H.* 4. 11.

CCXLVIII. Page 229. *Chancellor and Scholars of the Univerſity*, 3 *Jac.* 5. § 19. *N.* 1. altho the Univerſity be incorporate by the name of *Chancellor*, *Maſters* and *Scholars*; yet the deſcription here made of them by the name of *Chancellor* and *Scholars* is wel enough, and ſuffi-

sufficiently denotes the persons intended, and the University shall have the presentation, *&c.* As if the true name of Incorporation had been expressed, for Acts of Parliament as well as Wills are to be taken according to the Intent of the Makers, and not according to the strict Letter, 10 *Co.* 57.

CCXLIX. **Page** 229, 230. *Shall have the Presentation, &c.* 3 *Jac.* 5. § 19. *N.* 1. It hath been a Question what is given to the University by these words, whether only a bare power or liberty to present, or a settled Estate and Interest in the patronage or advowson, *Jones* 22. 25. where two Justices *Hutton* and *Jones* were divided in opinion upon this point.

For *Hutton* held that that which is given to the University by 3 *Jac.* 5. § 19. *N.* 1. is a settled Estate and Interest, and compared it to the Interest or Estate of the Lord who was to hold the Land, until he was satisfied, the value of the Marriage of the Heir, 52 *H.* 3. 6. § *N.* and to that of the Counsel by action, *Burnell* 11: *Ed.* 1. *pag.* 35. § *N.* and to an Estate given to a man, until C. *lib.* be paid. In all which Cases the party hath a settled Estate and Interest in the Land.

But *Jones* contrary, that the University by 3 *Jac.* 5. § 19. *N.* 1. hath only a power or liberty to present (when the Church becomes void, and compared it to the power given to the Bishop to present by lapse after the six months, 13 *Ed.* 1. 5. § *N.* and to that given by 25 *Ed.* 3. *St pag.* 121. § *N.* of Proviso's, where the Pope provides: and to

to that given to the King by 31 *Eliz.* 6. § *N.* of Symony: In which Cases no Estate or Interest is transferred, but only a power or liberty granted to present.

For this Act, 3 *Jac.* 5. § 19. *N.* 1. doth not remove the patronage from the Popish Recusant, but that continues still in himself, and he is Patron notwithstanding his Conviction, and as Patron shall confirm a lease made by the Incumbent, as he might have done before his Conviction, which proves that the Interest of the Patronage is not divested out of him, nor consequently settled in the University.

Note: Altho this 3 *Jac.* 5. be a general Statute, and 3 *Jac.* 5. § 18. *N.* 1. be general, of which the Judges ought to take notice; yet this part of it, 3 *Jac.* 5. § 19. *N.* 1. is Special and private, for that it concerns only particular persons, and must be pleaded or specially found, or otherwise the Judges cannot take notice of it, *Hob.* 227. *An. Needlers* Case: and 10 *Co.* 57. and 4 *Co.* 76. *Hollands* Case 13 *Ed.* 4. 8.

Page 230, 231, 232, 233. *During such time as the Patron thereof shall be, and remain a Recusant convict*, 3 *Jac.* 5. § 19. *N.* 1. If the University bring a second Impediment upon this Statute, they must averr that the Popish Recusant Convict was and remained such at the time when the Church became void. For without that they do not enable themselves to present; But they need not averr that he

he remains a Popish Recusant Convict at the time of the bringing of the second impediment; for when the presentment *hac vice* is once vested in the University, altho the Recusant conform or dye, yet the University shall present.

These words 3 *Jac.* 5. § 19. *N.* are words of Restraint, and the Statute gives only a limited power to the University, *scilicet*, so long as the Recusant shall be patron, or the patron shall be a recusant. So that if before the Church becomes void the recusancy be removed from the patron by his conformity or the patronage be removed from the Recusant, altho he continues a Recusant, the University have lost their power to present *Jones* 19.

And therefore if the Patron grant the advowson in Fee, or in Tail, or for life, or years; these Cases are out of the Statute, 3 *Jac.* 5. § 19. *N.* 1. And altho after the Grant she becomes a Popish recusant convict, and then the Church becomes void, yet the University shall not present.

And it seems that altho the Patron make such a Grant of the advowson after his conviction, and before the Church is void, yet this shall barre the University, for the patronage was before the Avoidance removed from the Reversion, *Jones* 12. 10 *Co.* 56. contrary to the opinion of *Hutton*, who held that if a man made a lease for years of an advowson, yet if afterwards he becomes a Popish recusant convict, the University shall

shall have the presentation as a future Interest given to them by this Act, notwithstanding such Lease *Jones* 20. And the reason, why by such Grants the University shall be barred, is, for that the Disability here inflicted on the Recusant is only a disability to present, or to grant the next Avoydance, which extends not to any of the Grants before-mentioned, nor severs the patronage from the Patron, as those other Grants do.

And the intent of 3 *Jac.* 5. § 19. *N.* 1. is to prevent a Presentation by the Recusant or by him to whom he should grant the Avoidance, who it was presumed would present such a one as the Recusant should appoint. But now when he grants the Advowson it self away, that Mischief is prevented, and the Statute 3 *Jac.* 5. § 19. *N.* 1. intended not in that Case to give away the presentation from the Grantee to the University, *Jones* 19, 20. And yet if the Recusants grant of the Advowson in Fee or in Tayl, or for Life or Years, were by Covin or in Trust on purpose to avoid this Statute, and be averred and found so to be, such Grant shall not barr the University, 10 *Co.* 56, *Jones* 20. *supra* 246. *N.* 3. See *Godbolt* 216 *Pl.* 309.

But then the Averment in such Case must not be of Covin or fraud to any other intent, only; but it must be averred to be to the particular intent to avoid this Statute, and defeat the University of the Presentment, and so it must be found by the Jury, *&c.*

A man

A man ſeiſ'd *inter alia* of an Advowſon in groſs becomes a Popiſh Recuſant convict, the King ſeiſeth the Advowſon, as part of two parts; the Church becomes void in this Caſe, it was held by *Hutt.* that the Univerſity, and not the King ſhall preſent; but *Jones* 17 held ſtrongly to the contrary, and that notwithſtanding 3 *Jac.* 5. § 19. *N.* 1. the King ſhall have the Preſentation, for 3 *Jac.* 4. § 11. *N.* 4. ſaith that the King may take and ſeize two third parts of a Recuſants Hereditaments, under which word an Advowſon is comprehended, *ſupra* 178. *N.* 2.

And altho the power or liberty of preſenting is here 3 *Jac.* 5. 19. *N.* 1. given the Univerſity, yet that is to be intended only in ſuch Caſes where a Popiſh recuſant convict is Patron, but when the King hath ſeized the Advowſon as part of his two parts, the King is Patron and not the Recuſant; nor ſhall the title the King hath to the Advowſon by 3 *Jac.* 4. § 11. *N.* 4. be diveſted by another Act of Parliament, unleſs it had been given away from the King in expreſs terms, which *Worb.* and *Winch.* agreed.

To this it hath been objected that when 3 *Jac.* 5. § 18. *N.* 1. diſables the Recuſant to grant any Avoidance, it diſables him to grant it to the King as well as to any other perſon; but if the Recuſant may forfeit the Advowſon to the King, he may forfeit the avoidance to the King, and every forfeiture being a Grant or Gift in Law, as *Com.* 260.

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263. *Hales* Case, the Recusant by consequence may grant the Avoidance *contrary* to the express Letter of this Act.

But to pass by the Questions whether by the recusants being disabled to grant any Avoidance generally, he is disabled to grant an Avoidance to the King? or whether the forfeiture of the two Third parts by the recusant can be properly called a Gift or Grant from the Recusant, and not rather from the Law, which creats the Forfeiture?

It's enough here to distinguish between Voluntary Acts and Acts of Compulsion, for 3 *Jac.* 5. § 18. *N.* 1. was intended only to restrain his Voluntary acts; but when he forfeits the avoidance to the King, altho the offence, *viz.* his recusancy be voluntary, yet the conviction and forfeiture thereupon are involuntary, and the recusant is therein *potius patiens quam agens*, Jones 21.

A Popish recusant convict seized in Fee of an Advowson in gross, is attainted of felony or *Præmunire*, and the Church becomes void; in this case, *Jones* 20-26. *Hutt.* held that the Interest, which accrued to the University upon the conviction for recusancy by 3 *Jac.* 5. § 19. *N.* 1. should not be divested by the attainder, *Jones* contra.

And that if a man seised of such an Advowson acknowledge a Statute Merchant, and afterwards becomes a Popish Recusant convict, and then the Statute is extended the Interest of the University by 3 *Jac.* 5. § 19. *N.* 1. shall not be divested by the extent, *Jones* 20-26.

If

If the King seize two parts of a Mannor belonging to a Popish Recusant convict for non-payment of the Forfeiture of XX. lb. per Month by 3 *Jac.* 4. § 11. *N.* 4. to which Mannor an Advowson is appended, the two parts of the advowson shall follow the two parts of the Mannor, and the King shall present and not the University, notwithstanding 3 *Jac.* 5. § 19. *N.* 1. For after such Seisure the King is Patron of the advowson and not the Recusant; and in this Case the King shall present alone, *Hob.* 126. *Walgrond's* Case, *Moor* 872. *pl.* 1214.

Page 233. *As shall then have any other Benefice with cure of Souls* 3 *Jac.* 5. § 21. *N.* and not as is already beneficed as *Wingate Coron* 140. mistakes, for a *fine cure* is a benefice, and yet the University may present or nominate him who hath a *fine cura.* CCLI.

A Donative of the King's may be *cum curâ animorum*, and so is the Church of the Tower of *London*, 1 *Co.* 330. *Mackaller's* Case, and the University by 3 *Jac.* 5. § 21. *N.* 1. cannot present or nominate him that hath such a Donative.

Notwithstanding 3 *Inst.* 155. it seems that a Deanary, Archdeaconry, Prebend, *&c.* are not Benefices with cure of Souls, nor had they been comprehended under that name in 21. *H.* 8. 13. § 9. *N.* altho the special *Proviso* 21. *H.* 8. 13. § 31. *N.* 1. had been omitted, for that *Proviso* is *ex abundanti*, and there is no such to except them out of 13 *Eliz.* 12. § 3. *N.* 1. of reading the Articles;

ticles. And yet if a Dean, Archdeacon or Prebendary read not the Articles within the time limited by 13 *Eliz.* 12. § 3. *N.* 1. his promotion is not void by that Statute, and the reason is, because 'tis not a Benefice with cure of souls.

The opinion of Justice Trial at *Lincoln* in Lent Assizes 1668. who in the case of Doctor *Sanderson* denied the Archdeacon, for that he had not read the Articles within the time so limited and affirmed an Archdeaconry to be a Benefice with care within 13 *Eliz.* 12. § 3. *N.* 1. being contrary to the Law and to the received meaning of that Statute.

And as for a Prebend, the reason given for the opinion in 3 *Co.* 79. *Bland* and *Madox* case is expressly against 3 *Inst.* 155. for it was there agreed that a Lay-man may be presented to a Prebend, *quia non habet curam animarum.*

And for the same reason a Dean, Archdeacon, Prebendary, *&c.* may be in this case presented or nominated by the University by 3 *Jac.* 5. § 21. *N.* 1. for their promotion is not a Benefice with cure of souls.

Quere, For if the Corps be a Church with cure, as it may, he must read Articles; but if the Church be only appended, the Promotion regularly is no cure of souls, which I infer from *Dyer* 273. *pl.* 38. *Goodman's* Case: and 18 *Ed.* 3. 36. *pl.* 20. and 1 *Co.* 330. *Mackaller's* Case. and 9 *Ed.* 3. 22. *pl.* 14.

CCLV. Page 234, 235. *Convicted at the time of the*

the death of any Testator, or at the time of the Granting of Administrator, 3 *Jac.* 5. § 22. *N.* 2. These words are to be constructed *reddendo singula singulis*, viz, that the Recusant shall be disabled to be Executor, if he be convicted at the time of the death of the Testator, or to be administrator, for so these words (at the time of the granting of any administration) are here to be understood.

And therefore if a man makes his will, and therein appoints a recusant convict to be his Executor, and before the Testators death the conviction is removed by reversal of the judgment, or avoided or discharged for some defect in the Indictment, Proclamation or other Proceedings, and then the Testator dyeth, in such case the Recusant is not by this Act 3 *Jac.* 5. § 22. *N.* 2. disabled to be Executor.

For altho the naming of an Executor is in Law a granting administration, and if a man by his last Will grants the administration of his Goods and Chattels to *J. S.* without more saying thereby *J. S.* is made Executor *Dyer* 290. So that the Naming of an Executor and the Granting of administration within the meaning of 3 *Jac.* 5. § 22. *N.* 2. Administration here relating only to an administrator and not to an Executor; besides the naming of an Executor amounts not to a compleat Grant of administration untill the Testators death; for then, and not before, the Will becomes in force, and if the

party stands not then convicted, he is not disabled.

Much less shall he be disabled to be Executor who is not convicted at the time of the death of the Testator, altho he be convicted at the time of the *Probat* of the Will; for if these words (*Granting of Administration*) 3 *Jac.* 5. § 22. *N.* 1. should relate to an Executor as wel as to an Administrator which in truth they do not: yet the power given to the Executor by the Ordinary or Ecclesiastical Judge upon the *Probat* of the Will cannot be called a Granting, but only a committing of Administration according to the Will of the Deceased: and in such case all that the ordinary or Ecclesiastical Judge can grant, are Letters testifying what the Testator hath already given to the Executor, and a power or authority to execute the Will.

CCLIII. Page 235. *as Guardian in Chivalry*, 3 *Jac.* 5. § 22. *N.* altho the recusant seised in Chivalry, and convicted, could not have been Guardian; yet if he had granted the seigniory to one who was no recusant, the Grantee should have been Guardian notwithstanding this Act, for the mischief intended here to be pretended was removed when the seigniory was granted to another who was no recusant by *Jones* 19. So if the King had seized, the recusants seigniory as part of his two parts, the King, should have had the Wardship and not the next of Kin, for the same reason, *Jones* 21.

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Page 236, 237. *Shall be thought unmeet for such recusant* 3 *Jac.* 5. § 26. *N.* 2. So that the Justices of peace are not bound by this Act to deface all reliques of Price or to burn or deface all other Reliques or Popish books, as *Wingate Coron.* 144. misleads, *&c.* And though herein much is referred to the discretion of the Justices of peace, yet where the Husband is a Protestant, and only the Wife a Popish recusant, it seems by these words 3 *Jac.* 5. § 26. *N.* 2. that they are not to consider what is unmeet for the Husband, but what is unmeet for the Recusant, *viz.* the Wife: and that it was not intended that they should seize, burn or deface any Books of the Husbands tho Popish, unless such whereby the Wife might be aided or confirmed in her superstition. So that in this Case Books written in a Language or Style unintelligible to the Wife are not within the meaning of 3 *Jac.* 5. § 26. *N.* 2. nor ought by colour thereof to be taken from the Husband who is no Popish Recusant. CCLIV

Page 238. *In the same County where such Popish Recusant shall be resident*, 3 *Jac.* 5. § 27. *N.* 1. A Popish Recusant lives in one County, and his Arms are kept in another County by one who is no Popish Recusant, such Arms cannot be seized by force of this Act by the Justices of Peace of either County. CCV. *Warre.*

Not by the Justices of Peace of the County where the Arms are kept for the seizure or taking is here limited to be by Warrant at

the Sessions in the County where the Recusant resides, and 3 *Jac.* 5. § 27. *N.* must be strictly pursued in that particular: nor by the Justices of peace of the County where the Recusant is resident, for the Arms are in another County where they have nothing to do.

Justices. And altho in some cases where a Statute appoints a Justice of peace to do a thing, he may do it out of his County as to take an *Examination* upon the Statute of *Winton*, 13 *Ed.* 1. *St.* 2. *Cap.* 1. *N.* of a Robbery. 27 *Eliz.* 13. § 11. *N.* 2. as was resolved 1 *Co.* 213 *Jones* 239. *Helier* verſ. *H.* of *Bluhurſt*, yet he cannot exercise any coërcive power out of his County, as was resolved in that Case for his *poteſtas jurisdictionis* is confined to his County as well as that of a Bishop is confined to his Diocess, see *Palmer* 473. *Astuishs* case *infra* 266. *N.* 2. And here the taking of the Recusants armour is a coërcive act, and therefore by 3 *Jac.* 5. § 27. *N.* 1. can be executed by warrant of the four Justices of peace in that County only where they are Justices: so that this is clearly *casus omissus* and not provided for by this Act

CCLVI. Page 238. *Imprisoned by Warrant of or from any Justices of peace*, 3 *Jac.* 5. § 28. *N.* 1 any two Justices may grant their Warrant for imprisoning the Offender; and 'tis sufficient in this Case, for *Pluralis numerus eſt duobus contentus*, but a Warrant from any one Justice will not serve contrary to *Wingate Cerun.* 145.

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Page 238, 239. *Of ſuch County* 3 *Jac.* 5. § 28. *N.* 1. that is of the County where the Popiſh Recuſant is reſident, for no other County was named before a Popiſh Recuſant lives in one County, and his Arms are kept in another County by one who is no Popiſh Recuſant, the Juſtices of peace of that other County cannot by force of this Act, 3 *Jac.* 5. § 28. *N.* 1. impriſon him that keeps them, for they are not named here but the power in this Caſe is expreſſly limited to other Juſtices and no other can intermeddle therein; neither will the Warrant of the Juſtices of peace of the County where the Recuſant is reſident, reach him who is in another County, for the coercive authority of a Juſtice of peace cannot exceed his limits or bounds, as *Comm.* 37. is held in the Caſe of the Lord *Say.* CCLVII.

It was reſolved that if a Juſtice of Peace of the County where the Felony was committed purſue a Felon into another County and take him there, the Felon muſt be impriſoned in the County where he is taken, and the Juſtice of peace who purſued him hath no power to carry him to the Gaol of the County where he did the Felony, for he is a Priſoner in the County where he was taken, and there the Juſtice of Peace hath no more power to do than an ordinary perſon, 13 *Ed.* 48. *Freſhſuit Br.* 3.

So that, as it ſeems in this Caſe, the party who keeps ſuch Arms, cannot be impriſoned by 3 *Jac.* 5. § 28. *N.* 1. but this like-

wiſe is *caſus omiſſus*, and not here provided for.

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7 Jac. 6.

Of Allegiance.

CCLVIII. Page 243. 243. upon 7 *Jac.* 6. § 8. *N.* 1. the King cannot diſpence with any Member of the Commons Houſe of Parliament from taking this Oath of Allegiance, for that he is here declared to be *perſona inhabilis*, untill he take it, *Vaughan* 355. *Thomas* and *Sorrell* ſupra, 44 and 3 *Inſt.* 154.

CCLIX. Page 246. *For any two Juſtices of Peace within any County, City or Town Corporate, &c.* 7 *Jac.* 6. § 26. *N.* 2. the two Juſtices may require this Oath of any perſon that ſhall happen to be within their Jurisdiction, altho his Habitation be in another County or Liberty, for the Oath of Allegiance *ſequitur perſonam non locum*, 2 *Bulſtr.* 155. the *King* againſt *Griffith*, &c.

CCLX. Page 246. *To require any perſon or perſons*, 7 *Jac.* 6. § 26. *N.* 2: This is an enlargement of the power given to two Juſtices of Peace by 3 *Jac.* 4. § 13. *N.* 4. For thereby they could have required the Oath but only in ſome particular Caſes, *ſupra* 181.

but

but by 7 *Iac.* 6. § 26. *N.* 2. they may require it of any perſon whatſoever of competent age and under the degree of a Baron or Baroneſs.

The Juſtices of the Peace in this Caſe 7 *Iac.* 6. § 26. *N.* 2. or the Juſtice of peace in the following Caſe, 7 *Iac.* 6. § 26. *N.* 4. may make his or their ſpecial Warrant to the Conſtable to bring the party before the ſaid Juſtice or Juſtices to take the oath; for by 7 *Iac.* 6. § 26. *N.* 2. by giving them power to require the Oath doth implicitly authorize them to make ſuch a Warrant *Quando Lex aliquid alicui concedit, concedere videtur, & id ſine quo res ipſa eſſe non poteſt*: and it is againſt the Office of the Juſtices of Peace and the authority hereby given them to go and ſeek the party, 12 *Co.* 130.

But the Conſtable cannot by vertue of ſuch Warrant break the Houſe where the party is, for he is no Offender before he refuſe the Oath or commit ſome contempt to the King.

Page 246. *If any Perſon or Perſons of or above the ſaid Age and Degree,* 7 *Jac.* 6. § 26 *N.* 3. that is of the ſaid Age, and above the ſaid Degree of a Baron or Baroneſs, for ſo the words muſt be taken, *viz.*, conjunctively, and not of ſuch who are of the Degree of a Baron or Baroneſs, and no more. For the precedent words 7 *Jac.* 6. § 26. *N.* 1. appointed that the Oath may be tendered to ſuch by any Privy Counſellour or the Biſhop of the Dioceſs in all Caſes, altho they were never CCLXI.

never Convicted, Indicted or Preſented but to ſuch Noblemen or Noblewomen as are above that Degree, it cannot be tendered by vertue of this Act, 7 *Jac.* 6. § 26. *N.* 3. unleſs they have been before convicted, indicted or preſented for not coming to Church, or not receiving the Sacrament; and in thoſe Caſes no leſs than three Privy Counſellours, *Quorum nunc*, &c. can tender it, 12 *Co.* 130, 131.

CCLXII *Dignity.*

Page 247. *If any Perſon or Perſons whatſoever*, &c. *under the ſaid Degree*, 7 *Jac.* 6. § 26. *N.* 4. A Baroneſs, or any Woman above that degree who is not of noble birth, but only by Marriage, becomes a Widow, and takes a ſecond Husband under the Degree of Nobility, and is convicted, indicted or preſented of Recuſancy, or complained of by the Miniſter, &c. to a Juſtice of Peace who finds cauſe of Superſtition, the Juſtice of Peace may require her to take this Oath, altho ſhe were once Noble, for by her ſecond Marriage ſhe hath loſt her Nobility and Name of Dignity together with the Priviledges of her Nobility, *Quando mulier nobili nupſerit ignobili deſinit eſſe nobilis*, which is to be underſtood of Nobility acquired by Marriage, *ſupra* 312. For that which was gotten by Marriage may alſo be loſt by Marriage, *Eodem modo quo quid conſtituitur diſſolvitur*; and in ſuch Caſe ſhe ſhall not be tryed by Noblemen, for they are no longer her Peers, 2 *Inſt.* 50.

But if a Woman be Noble by Birth or deſcent

ſcient, whomſoever ſhe marries, yet ſhe remaineth Noble, for Birthright is *Character indelebilis*, 4 *Co.* 118. *Actons* Caſe, and 6 *Co.* 53. Counteſs *Rutland* 6 and 7 *Ed.* 6. *Dyer* 79. *Roſin Br.* 31. 69. and 1 *Inſt.* 69.

And 'tis obſervable that 21 *H.* 8. 13. § 33. *N.* 1. provides that a Dutcheſs, Marqueſs, Counteſs, or Baroneſs, Widows, which take a ſecond Husband under the degree of a Baron, may notwithſtanding ſuch ſecond Marriage take ſuch number of Chaplains as if ſhe were a Widow, which ſhe could not have done, if it had not been expreſſly provided for by the Statute; and the reaſon given 4 *Co.* 118. is, becauſe by ſuch Marriage her Dignity is determined, but here 7 *Iac.* 6. § 26. *N.* 4. there being no ſuch proviſional Clauſe, ſhe ſhall not have the privilege of Nobility, but may be tendred the Oath of Allegiance by the Juſtice of Peace, as in the Caſe of a common perſon.

CCLXIII. **Page** 247. *Shall ſtand and be preſented indicted or convicted*, 7 *Iac.* 6. § 26. *N.* 4. Theſe words being in the Diſjunctive, it is not neceſſary that the party be convicted; but if he ſtand preſented or indicted for not coming to Church or not receiving the Sacrament, and be under the degree of a Baron, the Juſtice of peace ought to tender him this Oath.

CCLXIV. *Intendment:* **Page** 247, 248. *And the ſaid Juſtice ſhall find cauſe of Suſpicion*, 7 *Iac.* 6. § 26. *N.* 4. and not if the party be ſuſpected, as *Wingate Coron.* 159. miſtakes, for the bare ſuſpicion

ſpicion of the Juſtice of peace or any other Perſon is no ſufficient ground to require the Oath, or committ the party for the refuſal, but there muſt be ſome good cauſe for that Suſpicion, and the ſame muſt be alledged in Juſtice of peace his Plea or juſtification, if he be Sued for committing him to Priſon for ſuch refuſal. So if a Man be arreſted on Suſpicion of Felony, and brings his Action for falſe Impriſonment, the Defendant ought to ſhew ſome Matter in fact to induce his Suſpicion: for in theſe and the like Caſes a bare Suſpicion is no juſtification ſufficient, it being a Matter ſecret, and not traverſable; but the Cauſe of Suſpicion is traverſable, 3 *Bulſtr.* 28. 4. *Weale* verſus *Wells* 7 *Ed.* 4. 20. and 17. *Ed.* 45. and 5 *H.* 7. 4. And whether the Suſpicion be juſt and lawfull ſhall be tryed and determined by the Juſtices, 2 *Inſt.* 52. 11. *Ed.* 4. 4.

CCLXV. *Juſtices.* **Page** 248. *That then any one Juſtice of Peace*, 7 *Iac.* 6. § 26. *n.* 4. What was ſaid by *Coke* Chief Juſtice in *Griffiths* Caſe, 2 *Bulſtr.* 155. that any one Juſtice of Peace may miniſter this Oath, is to be underſtood of ſome Caſes only 12 *Co.* 130. which are no others than thoſe here mentioned, as he explains his meaning, 12 *Co.* 132. that one Juſtice of Peace cannot committ any for Refuſal of his Oath, unleſs they be proſecuted, indicted or convicted, and according to 7 *Iac.* 6. § 26. *n.* 4. *ſupra* 184.

CCLXVI. **Page** 248, 249, 250. *Within whoſe Commiſſion or Power ſuch Perſon or Perſons ſhall*

ſhall at any time hereafter be, 7 *Iac.* 6. § 26. *N.* 4: A perſon complained of, and againſt whom Cauſe of Suſpicion is found by the Juſtice of Peace, flyeth into another County, *Quære* whether a Juſtice of Peace of that other County can require the Oath of him, and committ him upon Refuſal; for he ſeems to be impowered thereunto by expreſs words of the Statute, for that the Party is fallen within his Commiſſion or Power, &c.

But yet I conceive that 7 *Iac.* 6. § 26. *n.* 4. By theſe words (*Any one Juſtice of peace within whoſe Commiſſion or Power*, &c.) is deſigned or intended no other Juſtice than a Juſtice of that County where the Party was complained of, and ſuſpected: and that if he fly into another County, no proceedings can be there upon the Complaint and Suſpicion in the County whence he came, nor any one Juſtice tender him the Oath, or committ him for Refuſal, without a new Complaint and Cauſe of Suſpicion in the County whither he flyeth.

For where the Party cannot be Indicted of a *Præmunire* for Refuſing the Oath upon the ſecond Tender at the Aſſizes or Seſſions by 7 *Iac.* 6. § 26. *n.* 6. There the Juſtice or Juſtices of Peace out of Seſſions cannot tender the Oath, or commit for Refuſal; for the Commitment is in order to a ſecond Tender and an Indictment of *Præmunire* thereupon, but in this Caſe the Party can not be Indicted of a *Præmunire* in the County where he flyeth for refuſing it upon the

ſecond

second Tender for the Offence for which the Party must be indicted, is a compleated Offence consisting of several Particulars, 1. In giving just cause of Suspicion without which the Party complain'd of according to this Act, 7 *Iac.* 6. § 26. *n.* 4. cannot be tendered the Oath by one Justice of Peace. Then 2. In refusing the Oath before the Justice of Peace who tendered it. And lastly, 3. In refusing it upon the second Tender at the Assizes or Sessions, all which must be comprized in the Indictment.

So that the cause of Suspicion is *pars communis*, and that arising in the County where the Party dwelt, and was complained of, cannot be punished in another County, unless the Statute 7 *Iac.* 6. § 26. *n.* 4. had expressly made it examinable there, *supra* 184.

True it is that some Statutes do enable Justices of Peace to punish an Offence done in another County, but that is where they enable them likewise to examin the truth of the Fact, and take Process and Evidence thereof. So 1 *Iac.* 27. § 5. *n.* 2. and 7 *Iac.* 11. § 8. *n.* 3. and *supra* 255. impower the Justices of Peace where the Party is apprehended to examin and punish the Offence, but in our Case the cause of Suspicion arising in one County is not made examinable, and consequently not punishable in another County, and if not punishable there no Justice of Peace of that other County can proceed upon that cause of Suspicion notwithstanding the Party happen to be within his Commission or Power.

But

But yet the Party ſo flying into another County may without any Complaint or cauſe of Suſpicion be tendered the Oath, and proceeded againſt there by two Juſtices of Peace *Quorum unus*, &c. by vertue of the fore-going words of this Clauſe, 7 *Jac.* 6. § 26. *n.* 2. Altho he dwell in another County, and that for the reaſon before given, *viz.*, becauſe this Oath *ſequitur perſonam non locum.*

But *Wingate Coron.* 150. ſaves the labour of this Queſtion, for he erroneouſly reſtrains the power of tendring the Oath in this Caſe to the Juſtice of Peace to whom the Complaint is made, as if no other Juſtice of peace of that County could proceed therein, which is contrary to the expreſs words as well as the meaning of 7 *Jac.* § 26. *n.* 4.

Note: That *Dalton* 107. *Cap.* 45. ſaith, it ſeems requiſite that the Juſtice or Juſtices of Peace do make like Certificat, as 3 *Jac.* 4. § 13. *n.* 5. at the next Aſſizes or Quarter-Seſſions of ſuch Perſons as have taken this Oath before them by force of 7 *Jac.* 6. § 26. *n.* 4. But upon what ground Maſter *Dalton* thought this requiſite to be certified at the Aſſizes I know not, ſeing there is no ſuch Certificate to be made by 3 *Jac.* 4. § 13. *n.* 5 but only to the General or Quarter-Seſſions of the Peace.

And as for the Seſſions, I conceive neither the Juſtices of Peace, if they proceed on 7 *Jac.* 6. § 26. *n.* 4. and not upon 3 *Jac.* 4. § 13. *n.* 5. are bound to make ſuch Certificate,

ficate, nor the Clerk of the Peace or Town-Clerk to record it, for it is not here required to be done.

But yet in such Cases where the same persons are impowered by both these Statutes to require and minister this oath, as where the Party is convicted of Recusancy, in which Case two Justices of the Peace, *Quorum unus &c.* may require the Oath by the Special words in this Clause of *7 Jac. 6. § 26. n. 2.* or of the General words in this Clause of *7 Jac. 6. § 26. n. 2.* And it doth not appear upon which of these Statutes they proceed, as it may sometimes so happen there, if the Party take it, will be safest for the two Justices to make such Certificate to the next General or Quarter-Sessions, as is appointed, *3 Jac. 4. § 13. n. 5.* and for the Clerk of the Peace or Town-Clerk to record it.

CCLXVII. **Page** 250. *If any Person or Persons*, this Clause, *7 Jac. 6. § 26. n. 5.* is General, and extends to all before: So that if any of the Nobility refuse this Oath, they may be committed to the Common Gaol, *&c.* by such as are by this Act Authorized to tender it, *12 Co. 131.*

CCLXVIII. **Page** 251. *Shall refuse to take the said Oath duly tendered to him or her, 7 Jac. 6. § 26. n. 5.* If the Persons authorized to tender this Oath, ask the Party whether he will take it, and he saith he will not *quære* whether this be such a Tender and Refusal as shall make the refuser liable to be imprisoned & proceeded against by force of this Act, unless

he or they who tender it, have in readineſs both the Form of the Oath and the Book to ſwear on; for it is to be preſumed that the Act intends all requiſite Circumſtances ready to enable the one to miniſter, and the other to take the Oath.

And 'tis held, that, before there can be any ſuch Refuſal of this Oath, as is here intended, it ought to be read or offered to be read to the Party, eſpecially if he be illiterate; or, if he be not yet, that, at leaſt it ought to be offered to him for himſelf to read it, for perhaps the Party never ſaw or heard it: And in ſuch Caſe it would be againſt Reaſon that the Refuſal ſhould be penal, and therefore in *9 Iac.* upon the Tender of this Oath at *Sarjeants-Inne* in *Fleet-Street*, it was read by Order of the Judges there.

Page 251. *To the Common Gaol 7 Iac. 9.* § 26. *n.* 5. The Juſtices of the Court, of *B. R.* uſed to tender this Oath in Court as Juſtices of Peace of *Middleſex*; and upon Refuſal the Party is to be committed to the Priſon of the *Marſhalſey*, which is the Ordinary Priſon of that Court, untill the next Seſſions, 2 *Bulſtr.* 155. *Dyer* 297. CCLXIX.

Page 252, 253, 254. *Being lawfully Convicted as a Popiſh Recuſant*, 7 *Iac.* 6. § 28 *n.* 1. That is upon Indictment at the King's Suit, or a Popular Action or Information upon 23 *Eliz.* 1. § 5. and 11. or Debate at the King's Suit alone, by 35 *Eliz.* 1. § 10. *n.* 2. *ſupra* 119, In which two laſt Caſes the CCLXX.

former Laws are somewhat altered by this Statute.

For by the former Laws 23 *Eliz.* 1. and 35. *Eliz.* 1. If a Person had been convicted of Recusancy any other way than by Indictment, no more could have been demanded, either by the King or Informer than for the Months mentioned in the Information or Count, and the Penalty should not have run on in such Case; for that 29 *Eliz.* 6. § *N* and 3 *Jac.* 4. § *N.* which appropriate the Penalty to the King after Conviction, intend no other Conviction than by Indictment, as hath been there said.

But by this Act 7 *Jac.* 6. § 28. *N.* 1. If a Popular Action or Information, or Action of Debt, *&c.* at the King's Suit alone be brought against the Husband and Wife for the Recusancy of the Wife, and Judgment be had against them, the Husband shall not only pay for the Time contained in the Information or Count, but the Wife shall be imprisoned ever afterwards, unless she conform, or the Husband pay ten Pounds *per* Month, or yield the third part of his Lands to the King.

And yet this Statute, 7 *Jac.* 6. § 28. *N.* 4. doth not after such Conviction of the Wife in a Popular Suit or Action of Debt, *&c.* at the King's Suit take away the Popular Action or Information from the Informer, or the Action of Debt, *&c.* from the King for the time to come, but

that

that they may be brought againſt the Husband and Wife for the Recuſancy of the Wife for any Month or Months wherein ſhe is abſent from Church after ſuch Conviction, for 7 *Jac.* 6. § 28. *N.* 1. and 23 *Eliz.* 1. § 11. *N.* 1. and 35 *Eliz.* 1. § 10. *N.* 2. are all Affirmative Laws, and may well ſtand together: So that any of the three Remedies given by theſe Statutes may be purſued, 7 *Jac.* 6. § 28. *N.* 1. not abrogating any former Law but only providing another way of Puniſhment for the Wife, after ſhe is once Convicted: howbeit ſhe ſhall not be puniſhed by any more than one of theſe three wayes, 11 *Co.* 63. 1 *Roll* 94. Doctor *Foſter's* Caſe: 2 *Co.* 529. *Parker* verſ. *Lawſon Crompt* 14.

And therefore, if the King bring an Action of Debt, *&c.* upon 35 *Eliz.* 1. § 10 *N.* 2. againſt the Husband and Wife, or the Informer ſue them upon 23 *Eliz.* 1. § 11. *N.* 1. for any abſence of the Wife from the Church, after ſhe is once Convicted by either of thoſe wayes, and recover: the Privy Counſellour, Biſhop, or Juſtices of Peace here mentioned, 7 *Jac.* 6. § 28. *N.* 1. cannot impriſon her by force of this Act for the non-payment of the ten Pounds *per* Month by the Husband for thoſe Months for which the King or Informer hath recovered: or for his not yielding the Thirds of his Lands to the King.

And the Reaſon is for that, when the Husband ſtands charged with the Penalty

of XX. *lib.* per Month for the abſence of the Wife, the Intent is ſatisfied in reſpect of thoſe Months of her abſence for which he ſtands ſo charged, for if he pay not the XX *lib.* per Month ſo recovered, the King or Informer hath the ordinary Remedy after Judgment by Proceſs or *Capias* againſt them both, and the Intent of the Act, 7 *Jac.* 6. § 28. *N.* 1. was no more than that the Husband ſhould pay for the Recuſancy of his Wife, or the Wife be impriſoned.

And if in this Caſe the Privy Counſellour, Biſhop, or Juſtices of Peace ſhould have power to inform the Wife, unleſs the Husband would pay ten *lib.* for the Months for which the King or Informer hath recovered, it would follow that the Husband hath his Election whether he will pay ten Pounds *per* Month to the King by force of this Act, 7 *Jac.* 6. § 26. *N.* 1. or the twenty Pound per Month ſo recovered againſt him by the King or Informer; for he ſhall not pay both the one and the other, for that were by his *puniri pro uno delicto* : and if he ſhall have his Election, the King or Informer might by this device be eluded of the Penalty of twenty *lib.* per Month ſo recovered, which could not be the intent of the Makers of this Law.

But if the Wife be after ſuch Conviction impriſoned by force of this Act, 7 *Jac.* 6. § 28. *N.* 1. neither the King or Informer can ſo ſue the Husband and Wife for the Recuſancy of the Wife, for ſhe is already puniſhed

niſhed by this Act, and muſt remain in priſon until the Husband pay the ten *lib.* for every Month, or yield the Thirds of his Lands to the King, or the Wife, conforms.

So if the Husband yields the Thirds of his Lands to ſave his Wifes impriſonment, he is already puniſhed by this Act, 7 *Jac.* 6. § 28. *N.* 1. and ſhall not again be puniſhed or ſued by the King or Informer, either upon 23 *Eliz.* 1. § 11. *N.* 1. or 35 *Eliz.* 1. § 10. *N.* 1.

And if after ſuch Conviction of the Wife he pay ten *lib.* per Month, to ſave her impriſonment, he cannot be ſued with his Wife for the twenty *lib.* per Month upon either of thoſe Statutes by the King or Informer, for theſe Months of her abſence from Church incurred after her Conviction, for which he hath paid the twenty *lib.* monthly to the King; for he ſhall not *bis puniri pro uno delicto.*

Hitherto hath been ſpoken of the Conviction of the Wife at the King's Suit alone by Action of Debt, *&c.* or by the Informer, *Qui eam, &c.* which doth not appropriate the Penalty to the King by 29 29 *Eliz.* 6. § 4. *N.* 1. or 3 *Jac.* 4. § 8. *N.* 2.

If the Wife be Convicted of Recuſancy upon an Indictment, it hath been much debated whether that doth not appropriate the Penalty of twenty *lib.* per Month to the King for the time to come, by 29 *Eliz.* 6. § 4. *N.* 1. and 3 *Jac.* 4. § 1. *N.* 2. that the

King cannot bring an Action of Debt, or the Informer any Popular Suit againſt the Husband and Wife for any Offence of Recuſancy committed by the Wife after ſuch Conviction. *Supra* 79. *N.* 17. and 173. *N.* 2. However, admitting they may yet now, if the King take advantage of this Statute, 7 *Jac.* 6. § 28. *N.* 1. and the Wife be either impriſoned, or the Husband yields the third part of his Lands to the King, there is no queſtion but the King and the Informer are both barred to ſue for the twenty *lib.* per Month for any time incurred after her Conviction, for the King hath made his Election to puniſh her this way, and the Informer cannot ſue her, for ſhe is puniſhed already at the Suit of the King. And if the Husband pay the ten *lib.* per Month, the King and Informer are likewiſe barred for thoſe Months of her abſence from Church, incurred after her Conviction, for which the Husband hath paid the ten *lib.* monthly to the King, for he ſhall not be twice puniſhed for the ſame Offence.

CCLXXI. **Page** 255. *Of all his Lands and Tenements*, 7 *Jac.* 6. § 28. *N.* 1. By *Tenements* are to be underſtood Offices, Rents, Commons, Profits, Apprendre out of Lands, Advowſons and the like; wherein a man hath any Frank-Tenement, and whereof he is ſeized *ut de libero tenemento*, for all theſe are included under the word [*Tenements*] as well as Lands and other Inheritances, which are holden, 1 *Inſt.* 6. 11. *H.* 6. 22.

22. Grants *Br.* 143. *Perkins* Sect. 114, 115. *Finch.* 130. 2 *Anderſon* 4: the Womans Lawyer 3. *P.* 188. But Tenement extends not to a Chattel or Leaſe for Years, *Done Br.* 41. grants *Br.* 87. 1 *Bulſtr.* 101. *Turpine* againſt *Farryer*. So that the Husband need not yield to the King the third part of his Leaſes for years for the Recuſancy of his Wife.

CCLXXII. Page 255, 256. *Shall continue out of Priſon*, 7 *Jac.* 6. § 28. *N.* 1. A married Woman convicted as a Popiſh Recuſant, is (after her Conviction, and before any further proſecution, or any Election made by the Husband whether he will pay the ten pound *per* Month, or yield the third part of his Lands.) impriſoned by Proceſs of Law or for ſome other Clauſe not relating to ſuch Conviction, and afterwards is ſet at liberty: it ſeems that the Husband ſhall not pay the ten *lib.* per Month for the time ſhe was in Priſon.

For the Act 7 *Jac.* 6. § 28. *N.* 1. ſpeaks only of the time during which ſhe continueth out of Priſon; and altho ſhe were not impriſoned for her Recuſancy, yet ſeeing ſhe had not, during ſuch her impriſonment, the Benefit intended to her in conſideration of the ten *lib.* per Month, or third part, *viz.*, her liberty; the Husband ſhall not for that time pay the Penalty here appointed to ſave her Impriſonment; but if he pay it for the time after ſhe is ſet at Liberty, that is ſufficient to ſatisfy the intent of this Act.

But

But if after ſuch Conviction the Wife be impriſoned by Covin upon ſome pretence not relating to ſuch Conviction, that ſhall not ſave the Husband's payment of the ten *lib.* per Month for the time ſhe was impriſoned, but after ſhe is ſet at Liberty ſhe may be again impriſoned by force of this Act, 7 *Jac.* 6. § 28. *N.* 2. unleſs the Husband pay the ten pound per Month, or ſatisfy to the King the third part of the Profits of his Lands, as well for the time of ſuch Covenous Impriſonment, as for the future: for the Covenous Impriſonment, was upon the matter her own act, and no perſon ſhall take advantage of an Impriſonment covenouſly cauſed by him or her ſelf, 16 *Ed.* 45. and here ſhe continued out of Priſon in the ſenſe of this Act, 7 *Jac.* 6. § 28. *N.* 1. becauſe her Impriſonment was not by proceſs of Law *in invitam.*

And ſo if a man be outlawed while he is in Priſon, yet the Outlary ſhall not be avoided for that cauſe, if the Impriſonment were by Coven or conſent of the party outlawed, 1 *Inſt.* 259. 38. *Aſſ.* 17.

3 Car.

3 Car. 1, 2. (3)

Of Ouſter le Mere.

Page 258, 259. *Or of Oyer and Terminer*, 3 *Car.* 1. *Cap.* 2. (3) § 3. *N.* 1. Juſtices of Peace cannot take an Indictment upon this Statute, for no inferior Court ſhall take authority by any Statute, unleſs it be ſpecially named, *Savill* 135. *pl.* 212. *Agard* and *Sandiſh.*

And altho Juſtices of Peace have in their Commiſſion, § 14. an expreſs Clauſe *ad audiendum & terminandum*; yet foraſmuch as there is a Commiſſion of *Oyer* and *Terminer* known diſtinctly by that name, and the Commiſſion of peace is known diſtinctly by another Name, they ſhall not be included under the general words of Juſtices of *Oyer* and *Terminer*, as was adjudged 3 *Co.* 87. *Hill* 30 *Eliz. B. R.* in *Smyth*'s Caſe, who was Indicter at the Seſſions of the Peace in the County of *Oxford* on 5 *Eliz.* 14. of Forging Deeds, which impowers Juſtices of *Oyer* and *Terminer* to inquire of, hear and de-

determine that Offence, and yet the Indictment before the Justices of Peace was quasht, as taken *coram non judice*, 9 *Co.* 118. 3 *Inst.* 103. and 3 *Co.* 60. 1. *Wilson's* Case, and 3 *Co.* 697. *Hunts* Case, See *Justices.*

FINIS.

KNowing the Learning and Induſtry of the Author of this Work, who hath therein very ſeaſonably beſtowed his Pains upon Explaining the Antient Laws made againſt Recuſants; I do Recommend the ſame to the Publick.

Fra. NORTH.

May the 7.
1681.